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IN THE

Supreme Court of the United States

E & L CONSULTING, LTD. d/b/a C.B.C. LUMBER, CO.; and C.B.C. WOOD PRODUCTS, INC.,

Petitioners,

v.

DOMAN INDUSTRIES LIMITED; EACOM TIMBER SALES LTD.; and SHERWOOD LUMBER CORP.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an exclusive distributorship agreement can be challenged under the Sherman Act when it is alleged that the manufacturer has monopoly power over the supply of a unique product?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners are E & L Consulting, Ltd. d/b/a C.B.C. Lumber, Co., and C.B.C. Wood Products, Inc. Respondents are Doman Industries Limited, Eacom Timber Sales Ltd., and Sherwood Lumber Corp. Petitioners E & L Consulting, Ltd. and C.B.C. Wood Products, Inc. do not have a parent corporation, and no publicly held corporation owns 10 percent or more of their stock.

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IN THE SUPREME COURT OF THE UNITED STATES

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On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

E. Christopher Murray, of the firm Reisman, Peirez & Reisman, L.L.P., on behalf of E & L Consulting, Ltd. and C.B.C. Wood Products, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1-15) is reported at 472 F.3d 23. The opinion of the United States District Court for the Eastern District of New York (Pet. App. 16-35) is reported at 360 F.Supp.2d 465.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit affirming the Judgment of the United

States District Court for the Eastern District of New York was entered on December 15, 2006. The Order denying the Petition for Rehearing and for Petition for Rehearing En Banc was entered on February 20, 2007 (Pet. App. 38-39). This Petition is being filed within 90 days of the Order of the Court of Appeals for the Second Circuit denying the Petition for Rehearing and Petition for Rehearing En Banc. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The relevant provisions of the Sherman Act, specifically 15 U.S.C. §1, and §2, and Fed.R.Civ.P. 12(b)(6) are set out in an appendix to this petition (Pet. App. 40-41).

STATEMENT

This action arises, *inter alia*, from a challenge under the Sherman Act to an exclusive distributorship agreement between Doman Industries Ltd. ("Doman"), which controls 95 percent of the supply of green hem-fir lumber available for sale in the northeastern United States, and Sherwood Lumber Corp. ("Sherwood"), whereby Doman ceased making available green hem-fir lumber to competing resellers in the northeastern United States, and agreed to only deliver green hem-fir lumber to Sherwood. The Second Circuit upheld the dismissal, at the pleading stages, of the Amended Complaint by a former reseller of green hem-fir lumber, E & L Consulting, Ltd. ("E&L"), holding that the Amended Complaint did not sufficiently allege an injury to competition as required to state a claim under the Sherman Act.

Specifically, the Second Circuit determined that since Doman could establish "its own in-house distribution system" that would be capable of exercising the same monopoly in the resale market as Sherwood was alleged to possess, the exclusive distribution arrangement between Doman and Sherwood could not harm competition at the resale level because Doman could achieve the same elimination of competition "without the aid of a distributor" (Pet. App. 9-10). Accordingly, the Second Circuit held that a

manufacturer, who allegedly has monopoly power over the supply of a unique product, could eliminate competition among resellers without violating the Sherman Act because it is presumed, as a matter of law, that the manufacturer could accomplish the same elimination of competition in the resale market by participating directly at the distribution level.

Thus, by its decision in this case, the Second Circuit has necessarily established a rule that exclusive distribution agreements are immune from liability under the Sherman Act because the Second Circuit's reasoning would apply to and effectively bar a challenge under the Sherman Act to any exclusive distribution arrangement.

As set forth in the Amended Complaint (Pet. App. 42-54), green hem-fir is an inexpensive and high quality lumber product, often utilized for home building, including the framing of houses, and is in great demand in the northeastern United States by end-users such as home builders. There are no substitute lumber products comparable to green hem-fir, because no other type of lumber combines the qualities that permit it to be used where it will be exposed to the elements over long periods of time with green hem-fir's ability to be economically manufactured in large quantities.

Beginning in 1990, E&L entered into an arrangement with Doman, and later its subsidiary Eacom Timber Sales Ltd. (Eacom), to sell green hem-fir lumber in New York, New Jersey and Pennsylvania. At all relevant times, over 95 percent of green hem-fir lumber available for sale in the northeastern United States[1] was supplied by Doman.

E&L's arrangement with Doman and Eacom was that E&L would take delivery of the lumber at its facility in Red Hook, Brooklyn, New York, and would sell green hem-fir

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[1] Northeastern United States is defined in the Amended Complaint as New York, New Jersey, Connecticut, Rhode Island, Maryland, Delaware and Pennsylvania.

lumber to lumberyards at a price agreed upon by Doman. In return, E&L would receive a monthly payment, together with commissions.

Doman entered into comparative arrangements for the sale of green hem-fir lumber with other companies. Atlantic Coast Lumber Co. ("Atlantic Coast") located in Providence, Rhode Island, had an agreement with Eacom and Doman that was similar to E&L's arrangement in that Atlantic Coast would sell Doman lumber on a commission basis. In addition, Futter Lumber ("Futter") in Wilmington, Delaware, bought green hem-fir outright from Doman and then resold it to lumberyards.

In January 1998, E&L's agreement with Doman and Eacom for the sale of lumber products in the northeastern Untied States was reduced to writing. In or about January 2003, a renewal written agreement was executed, whereby Eacom and Doman agreed to deliver green hem-fir lumber products to E&L for a three-year period, but either party could cancel the agreement on 90 days' written notice.

In 1998, Doman terminated Atlantic Coast's ability to distribute, as a commissioned agent, Doman green hem-fir lumber; and Sherwood Lumber Corp. ("Sherwood") began to take delivery and distribute green hem-fir supplied by Doman from the port facility in New London, Connecticut, a facility which had not been utilized by Sherwood as a green hem-fir cargo port, but was located within Atlantic Coast's service area. At the same time, Doman directed E&L not to sell green hem-fir lumber in Sherwood's sales area, *i.e.*, southern New England.

Then, in or about July 2003, Doman refused to ship anymore green hem-fir to Futter and designated Sherwood as the exclusive importer of green hem-fir lumber in New Jersey and Delaware, again precluding E&L from competing for customers in these states. Further, during this time period, Doman refused E&L's request to sell outright to E&L green hem-fir lumber, although Doman was selling this lumber to Sherwood.

On January 30, 2004, E&L received a letter terminating its agreement with Eacom based on an unspecified breach by E&L. In an effort to mitigate the harm to E&L, and to find a replacement source of green hem-fir lumber, E&L immediately contacted other potential suppliers. However, the only other company which supplies green hem-fir lumber in any kind of quantity but substantially less than Doman – Timber West – had only an extremely small inventory, and there were no cargo companies willing to ship lumber from Timber West to the eastern United States. Thus, the only way for Timber West to deliver its product was by rail, which is more expensive and less reliable than transporting the product by ship.

Further, other lumber suppliers such as Wareheuser, Boise and Hampton did not have green hem-fir lumber available, and potential alternative products such as Douglas fir and KD Hem Fir are more expensive and uncompetitive because the price elasticity of lumber precludes these products from being adequate substitutes. Also, there are no other forms of lumber which are comparable to green hem-fir because they are not adequate for use when the lumber will be exposed to the elements for a long period of time.

E&L was also prohibited from obtaining alternatives to green hem-fir lumber supplied by Doman because the only shipping carrier who transports lumber from Canada to the east coast of the United States refused to carry non-Doman lumber. Specifically, on February 9, 2004, E&L contracted the only shipping line that transports lumber from Canada to New York, Saga Forest Carriers, in an attempt to have non-Doman lumber products shipped to E&L's facility in Red Hook. E&L was told that no shipments could be made for an indefinite period of time even though Saga was shipping Doman lumber to Brooklyn.

As a result of the elimination of all sellers of green hem-fir lumber in the northeastern United States, except for Sherwood, there was an immediate increase in the resale price of green hem-fir lumber by over 20 percent.

Accordingly, the exclusive distribution arrangement between Doman and Sherwood has caused price increases, inflicting injury on homebuilders and purchasers of new homes, as well as lumberyards which often have long-term contracts to provide green hem-fir lumber at a fixed price.

E&L commenced this action alleging, *inter alia*, violations of the United States anti-trust laws because defendants utilized Doman's dominance of the supply of green hem-fir lumber to monopolize and restrain trade in this product in the northeastern United States. The District Court had jurisdiction over the subject matter of plaintiff's claims pursuant to 28 U.S.C. §§1331, 1343 and 1367 in that the case arose under 15 U.S.C. §§1, 2, 13, 15, and 18, New York State *General Business Law* §340 *et seq.* and New York State's common law.

The District Court (Hon. David G. Trager, J.), by its memorandum and order dated March 14, 2005 (Pet. App. 16-35), dismissed plaintiff's Amended Complaint in its entirety pursuant to Fed.R.Civ.P. 12(b)(6) holding, *inter alia*, that the Amended Complaint did not sufficiently allege an appropriate product market that could be the subject of an anti-trust claim, nor did plaintiffs sufficiently allege anti-trust injury.

The United States Court of Appeals for the Second Circuit had appellate jurisdiction over plaintiff's appeal pursuant to 28 U.S.C. §1291 because plaintiff timely appealed the order and judgment dated March 29, 2005, which dismissed the Amended Complaint in its entirety, by serving and filing a notice of appeal on April 13, 2005. The Second Circuit, by its decision dated December 15, 2006 (Pet. App. 1-15), affirmed the District Court's dismissal of plaintiffs' claims. The Second Circuit did not address the District Court's analysis as to whether a proper market had been alleged, but instead held that plaintiffs did not allege facts sufficient to show harm to competition.

REASONS FOR GRANTING THE PETITION

THE SECOND CIRCUIT'S DECISION EFFECTIVELY PROHIBITS, AS A MATTER OF LAW, ANY CLAIM UNDER THE SHERMAN ACT CHALLENGING EXCLUSIVE DISTRIBUTION AGREEMENTS AND IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

By assuming, as a matter of law, that a manufacturer who has a monopoly over a supply of a unique product is capable of undertaking resale activities in a vertical market, and as a result, no injury to competition for purposes of a Sherman Act claim can result from an exclusive distribution agreement, the Second Circuit has necessarily established a rule that all exclusive distributorship agreements are immune from liability under the Sherman Act. In every situation where there is a monopolistic manufacturer, the assumption utilized by the Second Circuit would apply. Accordingly, as explained below, the Second Circuit has adopted a standard which is at odds with the holdings of other circuits, and the Supreme Court should determine whether claims under the Sherman Act challenging exclusive distributorship arrangements are still viable.

In determining whether *per se* rules should apply in assessing challenged conduct under the Sherman Act, this Court has explained that *per se* rules create an "unintended and undesirable rigidity in the law" (*Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n16 [1977]). Instead, this Court has consistently favored examining challenged conduct under a rule of reason, whereby "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition" (*Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 [1918]; *see also State Oil Company v. Barkat U. Khan and Khan & Associates, Inc.*, 522 U.S. 3275 [1997]).

Further, this Court has long recognized that the Sherman Act prohibitions not only seek to preserve and encourage interbrand competition, but also play a role in protecting intrabrand competition, and that the concern for intrabrand competition is even more important when a manufacturer has monopoly power (*Continental T.V., Inc.*, *supra*, 433 U.S. at 52-55.)

Conversely, when there is significant interbrand competition, arrangements that restrict intrabrand competition are less significant and are more likely to be upheld. But, in any case, the analysis of "[t]he market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition" (*Id.* at 54).

Here, it is alleged that Doman controls 95 percent of the green hem-fir lumber that was available for resale in the northeastern United States, and that there were not adequate substitute products for this type of lumber material. Accordingly, the Amended Complaint alleges that Doman's elimination of all resellers of green hem-fir lumber except for Sherwood improperly eliminated competition in the resale market.

The elimination of competition between the resellers of Doman's green hem-fir lumber was appropriate for a challenge under the Sherman Act. However, the Second Circuit refused to permit this action to proceed beyond the pleading stage, precluding a factual analysis as to whether the exclusive distributorship in question had a negative impact on competition in the green hem-fir market, and if so, whether the elimination of competition was justified for legitimate business reasons.

Instead the Second Circuit relied on the presumption that Doman could directly sell its green hem-fir lumber in the northeastern United States, which factual assumption was not supported by the record, and, thus, there could be no harm to competition which is a necessary element of a Sherman Act claim. In addition, the Second Circuit assumed

that Doman would have no economic incentive to encourage a monopolization by Sherwood at the resale level because "a vertically structured monopoly can take only one monopoly profit."

If there is a legal presumption that a manufacturer cannot harm competition at the resale level by entering into exclusive distribution agreements because, as a matter of law, it is assumed that the manufacturer could directly sell its product to the public, every exclusive distribution agreement would be subject to this analysis and there would be no exclusive distribution agreement that could be challenged under the Sherman Act. Thus, the Second Circuit has effectively immunized any exclusive distribution agreement from a challenge under the Sherman Act, even if there is a manufacturer who has a monopoly over the supply of a unique product, and even where there is no effective competition from substitute materials. Further, under the Second Circuit's analysis, a monopolistic manufacturer is permitted to vertically impose a monopoly at the resale level.

And, while the Second Circuit has previously stated in *dicta* that it has not established a *per se* rule protecting exclusive distributorships from a challenge under the Sherman Act (*George Haug Co., Inc. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 140 n1 [2d Cir. 1998]), the Second Circuit has previously held that "exclusive distributorship arrangements are presumptively legal" (*Elec. Commc'ns Corp. v. Toshiba Amer. Consumer Prods., Inc.*, 129 F.3d 240, 242-43 [2d Cir. 1997]). Now, the effect of the ruling in this case, upholding an exclusive distribution arrangement by an alleged monopolistic manufacturer without any factual record, as well as the Second Circuit's previous holding in *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762 (2d Cir. 1995), is to effectively establish a *per se* rule, whether or not it is expressly stated as such. By contrast, other circuits, when faced with challenges to exclusive distribution arrangements, have engaged in the factual evaluation of a

challenged conduct required under a rule of reason analysis, necessarily rejecting an immunization of exclusive distributorships from challenges under the Sherman Act.

For example, in *Byars v. Bluff City News Co.*, 609 F.2d 843, 860-863 (6th Cir. 1979), the Sixth Circuit rejected any *per se* rule that exclusive distributorships cannot be challenged under the Sherman Act. Instead, the Sixth Circuit explained that while terminated distributors discover to their "chagrin" that they ordinarily do not have recourse under the anti-trust laws, if a supplier possesses monopoly power over the availability of a product in a geographic area, like Doman here, "added obligations are imposed on the defendant which would not attach in the ordinary refusal to deal context" and "[t]here are situations ... where a refusal to deal as part of a vertical integration scheme is anti-competitive" (*Byars v. Bluff City News Company*, 609 F.2d at 861). The Sixth Circuit also emphasized the detail factual analysis that is required of Sherman Act claims in that context (*see also Pac. Coast Agr. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 [9th Cir. 1975] *cert denied* 425 U.S. 959, 96 S.Ct. 1741 [1976]; *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291 [9th Cir. 1982]).

In addition, in *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 697 (7th Cir. 2006), the Seventh Circuit rejected the Second Circuit's reasoning here that there could be no circumstances where a monopolistic supplier could additionally benefit from a monopoly at the distribution or resale level. The Seventh Circuit observed upon a full summary judgment record that "a retail cartel might be able to compensate a producer that organizes and coordinates their group," although the Court determined that discovery in that case had not turned up any evidence of such compensation.

And, while this Court has not recently ruled on the viability of Sherman Act claims to traditional exclusive distributorship arrangements such is at issue here, this Court

has long held that a monopolistic manufacturer violates the Sherman Act if it refuses to sell to a distributor in an attempt to also monopolize the retail distribution market for its product (*Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 [1927]). Accordingly, the Second Circuit's reasoning that no injury to competition can occur as a result of an exclusive distribution agreement because the monopolistic manufacturer could directly exert its monopoly at the distribution level is contrary to this Court's precedents.

Further, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), this Court specifically held that analogous franchise limitations are analyzed under the rule of reason. In *Continental T.V., Inc.*, this Court in no way suggested that exclusive distributorships were immune from liability under the Sherman Act and recognized that vertical restrictions can have an anti-competitive effect, albeit one that may be justified. In fact, this Court has never held that exclusive distributorships are presumptively legal, and has specifically noted that the presumption utilized by the Second Circuit here that manufacturers have an economic interest in maintaining as much intrabrand competition as possible "is not universally shared" (433 U.S. at 56).

Accordingly, this case presents a critical issue to be determined – whether exclusive distribution arrangements may still be challenged under the Sherman Act. This Court has not provided any recent guidance as to this issue during a time period when the interpretation and application of the Sherman Act has significantly evolved, and challenges to exclusive distribution arrangements under the Sherman Act will inevitably continue.

In addition, the Second Circuit's decision that prohibits any factual analysis of the claim here, and the Second Circuit's reliance on specific legal presumptions to effectively eliminate any Sherman Act claims against an exclusive distribution arrangement, is in contrast with the decisions from other circuits requiring a factual analysis of

the effect on competition of an exclusive distribution agreement, especially when it is alleged, as here, that the manufacturer has monopoly power over the supply of a product which does not have substitutes. This conflict, and whether the Second Circuit's inflexible rule adopted in this case should be given effect, should properly be decided by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 2007

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------X

E&L CONSULTING, LTD., d/b/a C.B.C. LUMBER, CO.; and C.B.C. WOOD PRODUCTS, INC.,

Plaintiffs-Appellants,

- against - 05-1751-CV

DOMAN INDUSTRIES LIMITED; EACOM TIMBER SALES LTD.; AND SHERWOOD LUMBER CORP.,

Defendants-Appellees.

----------X

Before: WINTER, POOLER, and SOTOMAYOR, Circuit Judges.

Appeal from a dismissal by the District Court for the Eastern District of New York (David G. Trager, Judge) of antitrust claims against a lumber company and its eclusive distributor. We affirm because plaintiffs have not alleged facts sufficient to show harm to competition.

E. CHRISTOPHER MURRAY (Megan F. Carroll, on the brief), Reisman, Peirez & Reisman, L.L.P., Garden City, New York, for Plaintiffs-Appellants.

THOMAS J. MCNAMARA, Certilman Balin Adler & Hyman, LLP, East Meadow, New York, for Defendant-Appellee Sherwood Lumber Corp.

KELLY M. HNATT (Matthew P. Bosher, Leigh M. Nemetz, on the brief) Willkie Farr & Gallagher LLP, New York, New York for Defendants-Appellees Doman Industries Limited and Eacom Timber Sales Ltd.

WINTER, Circuit Judge

E&L Consulting, Ltd. ("E&L"), which does business under the name C.B.C. Lumber, Co., and C.B.C. Wood Products, Inc. appeal from Judge Trager's dismissal of their complaint against a Canadian lumber company and its exclusive distributor. The complaint asserts, among other things, that a distribution agreement between appellees violates *Section 1* of the Sherman Act, that the agreement is part of a monopolization scheme, and that the defendants are engaged in unlawful tying of products. We affirm principally because appellants have failed to allege facts that, if proven, would demonstrate harm to competition.

BACKGROUND

Because this is a dismissal under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim, we view the allegations of the complaint in the light most favorable to appellant. *Leeds v. Meltz, 85 F.3d 51, 52 (2d Cir. 1996)*. Those allegations are as follows.

From 1990 until 2004, E&L was the distributor of green hem-fir lumber in New York, New Jersey, and Pennsylvania for appellees Doman Industries Limited ("Doman") and Eacom Timber Sales Ltd., a Doman subsidiary. The termination of that distribution arrangement gave rise to the present dispute.

Green hem-fir lumber is an inexpensive, durable wood that is "often utilized for homebuilding," particularly in the northeast. There is no hem-fir or green hem-fir tree; the product is a manufactured combination of different woods. Doman and Eacom together supply 95 percent of the green hem-fir lumber sold in New York, New Jersey,

Connecticut, Rhode Island, Maryland, Delaware, and Pennsylvania.

Beginning in 1990, E&L had an arrangement with Doman under which E&L "would take delivery, but not ownership, of the green hem-fir lumber products at its port facility in Red Hook, Brooklyn, New York." E&L sold the lumber on Doman's behalf at prices set by Doman, and Doman provided E&L with set monthly payments and commissions. E&L had arrangements with two other green hem-fir distributors, Atlantic Coast Lumber Co. in Rhode Island and Futter Lumber in Delaware.

By 1998, Doman had severed its relationship with Atlantic Coast Lumber. To replace Atlantic Coast, Doman contracted with appellee Sherwood Lumber Corp., a New York corporation that sells lumber -- including green hem-fir -- and finished wood products. Under its agreement with Doman, Sherwood purchased green hem-fir lumber from Doman and resold it out of the port in New London, Connecticut. Doman prohibited E&L from selling lumber in the area served by Sherwood.

In 2003, Doman cancelled its agreement with Futter Lumber and replaced it with Sherwood. Doman continued to prohibit E&L from selling green hem-fir lumber in states served by Sherwood.

Doman allowed Sherwood to purchase Doman products outright and resell them itself, but it rejected E&L's request for the same arrangement. Furthermore, Doman "provided Sherwood with substantial discounts or favorable price structures for green hem-fir lumber as compared to the pricing Doman required of E&L." As a consequence, Sherwood was able to sell Doman lumber for "substantially lower prices than Doman permitted E&L." For example, Doman required E&L to sell 2x6 units of green hem-fir lumber for $ 314 while Sherwood was able to sell the same thing for $ 296.

On January 30, 2004, Doman terminated its distribution agreement with E&L. On February 1, 2004,

Doman notified its customers that Sherwood had become the exclusive distributor of Doman green hem-fir lumber in areas previously served by E&L, Futter, and Atlantic Coast.

E&L alleges that there are no commercially feasible alternative sources of green hem-fir lumber. Only one other company beside Doman supplies green hem-fir lumber -- Timber West -- and it supplies very little. Furthermore, no shipping carriers operate a route from the western United States to Brooklyn, and, consequently, the only way to get lumber from Timber West is by rail. This increases the cost of the lumber by "more than 10 percent," rendering it "uncompetitive for resale." In addition, the only ocean shipping line transporting lumber from Canada to New York told E&L that "no shipments [of non-Doman lumber products] could be made for an indefinite period of time." E&L alleges that Doman's reservation of all potential shipping methods was intended to prevent E&L and other distributors from obtaining an alternative source of supply.

E&L asserts that only a handful of other types of lumber are suitable for the framing of homes, and they cost 25 percent more than green hem-fir, which "precludes these products from being adequate substitutions." Once Sherwood obtained exclusive distribution rights in the northeast, it raised the price of green hem-fir lumber by, in some cases, "over 20 percent."

Finally, "Sherwood is now requiring customers who want to purchase green hem-fir lumber also [to] purchase Sherwood finished wood products." In the market for finished wood products, Sherwood is a competitor of plaintiff C.B.C. Wood Products. The complaint alleges that Doman and Sherwood conspired to allow Sherwood "to purchase green hem-fir lumber at a substantially reduced price so as to enable Sherwood to tie the sale of this product to the sale of finished wood products, such as plywood, and to drive Sherwood's competitors out of business."

In February 2004, E&L and C.B.C. Wood Products brought suit against Doman and Sherwood. Their amended

complaint asserts five claims under the federal antitrust laws: (i) that the Doman-Sherwood distribution agreement violates *Section 1* of the Sherman Act, *15 U.S.C. § 1*; (ii) that the defendants have engaged in a monopolization scheme in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*; (iii) that defendants violated *Section 7* of the Clayton Act, *15 U.S.C. § 18*; (iv) that they engaged in an illegal tying scheme in violation of *Sections 1* and *2* of the Sherman Act; and (v) that they have engaged in illegal price discrimination in violation of *Section 2* of the Robinson-Patman Act, *15 U.S.C. § 13*. The complaint seeks treble damages under *Section 4* of the Clayton Act, *15 U.S.C. § 15*. The complaint also alleges state law claims including breach of contract, tortious interference with contract, and violations of *New York's General Business Law § 340*.

On June 7, 2004, Doman and Sherwood separately moved to dismiss the plaintiffs' complaint for failure to state a claim. In a Memorandum and Order dated March 14, 2005, the district court granted the motions. *E&L Consulting, Ltd. v. Doman Indus. Ltd., 360 F. Supp. 2d 465 (E.D.N.Y. 2005)*.

The district court indicated that it was inclined to dismiss the suit against Doman as a matter of comity because Doman was in the Canadian equivalent of Chapter 11 bankruptcy. n1 *Id. at 470-71*. It nevertheless resolved the claims "on substantive (antitrust) rather than procedural (comity) grounds" in order to avoid "unnecessary duplicative litigation." *Id. at 471*.

n1 Under the terms of Doman's bankruptcy proceeding, "no suit, action, enforcement process, extra-judicial proceeding or proceeding of any other nature ... shall be proceeded with or commenced against [Doman]." Following its reorganization, Doman emerged from bankruptcy in July 2004.

The district court concluded that plaintiffs' federal antitrust claims failed because the complaint did not adequately allege a relevant product market, *id. at 471-74*, or injury cognizable under the antitrust laws, *id. at 474-76*.

With no remaining federal questions, Judge Trager declined to exercise supplemental jurisdiction over the state law claims. *Id. at 477*. The present appeal ensued.

DISCUSSION

a) Standard of Review

We review a district court's grant of a motion to dismiss under *Rule 12(b)(6)* de novo. *Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 776 (2d Cir. 2002)*. For purposes of such a review, we accept as true all allegations in the complaint and draw all reasonable inferences in favor of the non-moving party. n2 Id. Dismissal is appropriate only where the plaintiffs can prove no set of facts consistent with their complaint that would entitle them to relief. *Electronics Communs. Corp. v. Toshiba Am. Consumer Prods., 129 F.3d 240, 242-43 (2d Cir. 1997)*. However, conclusory statements are not a substitute for minimally sufficient factual allegations. *Furlong v. Long Island Coll. Hosp., 710 F.2d 922, 927 (2d Cir. 1983)*.

n2 We indulge in this assumption despite seeming anomalies in some factual allegations. For example, the complaint alleges that a 10 increase in transportation costs when rail is used renders green hem-fir lumber from another producer "uncompetitive for resale" because of the elasticity of demand for the product while also alleging that Sherwood has raised prices by over 20 and that alternative kinds of suitable lumber sell for 25 more than green hem-fir. Moreover, the complaint alleges that Doman has sold green hem-fir lumber at a discount to Sherwood to allow the latter to sell green hem-fir lumber at lower prices than E&L and to tie the sale of that product to Sherwood's sale of finished wood products, conduct that hardly benefits Doman.

b) *Section 1* Claim

Appellants' Sherman Act *Section 1* claim, based on the Doman-Sherwood distribution agreement, fails because they have not alleged an injury to competition, an element of a prima facie *Section 1* claim. n3

n3 One basis on which the district court dismissed the complaint was its conclusion that plaintiffs had not alleged "antitrust injury," *E&L Consulting, Ltd., 360 F. Supp. 2d at 474,* because they had failed to "allege some type of harm to competition market-wide," *id. at 475.* We agree with the district court that the plaintiffs' failure to proffer allegations of harm to competition is fatal to their antitrust claims. However, the failure to allege harm to competition is analytically distinct from failure to plead antitrust injury. *Blue Tree Hotels Inv., Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 220 (2d Cir. 2004)* ("Antitrust injury and competitive injury are conceptually distinct.").

Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977).* An antitrust plaintiff "must show not only injury-in-fact, but also that [the injury] constitutes ... the kind that the antitrust laws are designed to prevent and that [is] congruent with the rationale for finding an antitrust violation in the first place." Areeda, Hovenkamp & Blair, Antitrust Law § 335c4 (2000). It should go without saying, therefore, that a party cannot establish antitrust injury without establishing a violation of the antitrust laws, which, under *Section 1*, must involve an injury to competition.

Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 1.* It has long been "recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997).* A violation of *Section 1* generally requires a combination or other form of concerted action between two legally distinct entities resulting in an unreasonable restraint on trade. *Geneva Pharms. Tech. Corp.*

v. Barr Labs. Inc., 386 F.3d 485, 506 (2d Cir. 2004). If a restraint alleged is among that small class of actions that courts have deemed to have "such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit," it will be unreasonable per se. *State Oil, 522 U.S. at 10.* Most antitrust claims, however, are analyzed under a "rule of reason" analysis which seeks to determine if the alleged restraint is unreasonable because its "anticompetitive effects outweigh its procompetitive effects." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990).*

The complaint alleges a vertical restraint between a supplier (Doman) and a distributor (Sherwood). n4 The agreement between Doman and Sherwood designating the latter as the exclusive distributor of Doman green hem-fir in the northeast, like any commercial agreement, restrains trade. *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)* ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."). But, critically, nothing in the complaint suggests that this agreement results in either a "predictable and pernicious" (per se violation) or "unreasonable" (rule of reason violation) effect on competition. It is not "a violation of the antitrust laws, without a showing of actual adverse effect on competition market-wide, for a manufacturer to terminate a distributor ... and to appoint an exclusive distributor." *Electronics Communs. Corp. v. Toshiba Am. Consumer Prods., 129 F.3d 240, at 244.*

n4 "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988).*

Doman is alleged to have a market share in green hem-fir lumber amounting to 95% in the northeastern United States. Appellants do not assert that Doman's market share is somehow an illegal monopoly and seek no relief on that ground. But, they allege, the exclusive distributorship with Sherwood further harms competition. However, appellants' hypothesizing of an unreasonable effect on competition fails because such a vertical arrangement provides no monopolistic benefit to Doman that it does not already enjoy and would not continue to enjoy if the exclusive distributorship were enjoined. To put it another way, had Doman established its own in-house distribution system with the same monopoly that Sherwood is alleged to possess, there would have been no increase in the restriction of output of green hem-fir lumber and in the resultant misallocation of resources.

Indeed, an exclusive distributorship would be counterproductive so far as any monopolization goal of Doman is concerned. A monopolist manufacturer of a product restricts output of the product in order to maximize its profits. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 583-84, 106 S. Ct. 1348, 89 L. Ed. 2d 538 and n. 6 (1986)*; see also H. Hovenkamp, Economics and Federal Antitrust Law 1-36 (1985). The power to restrict output to maximize profit is complete in the manufacturing monopoly, and there is no additional monopoly profit to be made by creating a monopoly in the retail distribution of the product. See *Lamoille V. R. Co. v. Interstate Commerce Com., 711 F.2d 295, 318 (D.C. Cir. 1983)*; 3 Phillip Areeda & Donald F. Turner, Antitrust Law § 725b (1978). On the contrary, a firm with a monopoly at the retail distribution level will further reduce output to maximize its profits, thereby reducing the sales and profit of the monopoly manufacturer. See *Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 56, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*; *G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, 767 (2d Cir. 1995)*; see also *R.J. Reynolds Tobacco Co. v. Cigarettes*

Cheaper!, 462 F.3d 690, 696-97 (7th Cir. 2006); *Byars v. Bluff City News Co., 609 F.2d 843, 861 (6th Cir. 1979)*. Like any seller of a product, a monopolist would prefer multiple competing buyers unless an exclusive distributorship arrangement provides other benefits in the way of, for example, product promotion or distribution. See *Cont'l T.V., 433 U.S. at 54-56*. In fact, we have explicitly noted that "a vertically structured monopoly can take only one monopoly profit." *G.K.A. Beverage, 55 F.3d at 767*.

The only detriment to competition alleged to result from the Doman-Sherwood agreement is that "end-users of lumber and finished wood products have fewer options to purchase their required supplies and are now required to pay artificially inflated prices." This, by itself, is not a sufficient allegation of harm to competition caused by the exclusive distributorship, again, because the alleged single source and price increase, even if monopolistic, is something Doman can achieve without the aid of a distributor.

Thus, we have noted that "exclusive distributorship arrangements are presumptively legal." *Electronics Communs. Corp. v. Toshiba Am. Consumer Prods., 129 F.3d 240, at 245*. To be sure, we have never held that all exclusive arrangements are reasonable as a matter of law. In Geneva Pharmaceuticals, for example, we vacated a grant of summary judgment on a *Section 1* claim that was based on an exclusive supply agreement between a drug-maker and a supplier of the active ingredient in the drug. *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485 (2d Cir. 2004)*. We acknowledged the general rule that "it usually does not further harm competition for a monopolist in one market to leverage its advantage into a monopoly in a downstream market." *Id. at 508 n. 4*. However, in that case there was a "window of monopoly opportunity [that] is unique." Id. Geneva involved an allegation of two temporary, related monopolies in different products, a drug and its active ingredient. Moreover, the two firms, which had overlapping ownership, were jointly involved in predatory practices

designed to extend their respective temporary monopolies by deterring entry by competitors. *Id. at 492-93* (noting that the manufacturer of the active ingredient misled the plaintiff, who was a potential competitor with the drug manufacturer, telling it that the ingredient manufacturer "had no exclusive arrangement with respect to clathrate and that it could supply clathrate to [the drug manufacturer]" and attempting to "dissuade [the competitor] from pursuing its FDA application on the pretext that others were ahead of it, and that its market share would thus be proportionally smaller.").

The facts in *Geneva*, therefore, were quite different from the claim in a typical exclusive distribution case, like the present one, where it is alleged only that a monopolist manufacturer is trying to extend its monopoly into the distribution or sale of its product. Unlike Geneva, the present case is a "run-of-the-mill exclusive distributorship controversy, where a former exclusive distributor is attempting to protect its competitive position vis a vis its supplier." *Electronics Communs. Corp. , 129 F.3d at 245.* The complaint simply does not allege, therefore, "that the challenged action has had an actual adverse effect on competition as a whole in the relevant market." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993)* (emphasis in original).

c) *Section 2* of the Sherman Act

Appellants' *Section 2* monopolization claim fails for similar reasons. *Section 2* makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations." *15 U.S.C. § 2.* A viable claim under *Section 2* challenging a distributorship agreement must, like a *Section 1* claim, show a harm to competition. *Electronics Communs. Corp. , 129 F.3d at 246* ("The agreement between Audiovox and Toshiba cannot harm competition, and therefore cannot serve to further an alleged monopolization scheme."). For the reasons stated above, the complaint fails to allege facts

that would show that the exclusive distribution agreement between Doman and Sherwood harms competition, and it cannot be the basis of a monopolization scheme under *Section 2*.

Nor is the allegation that Doman reserved shipping space with the intent to exclude other manufacturers of green hem-fir lumber from that space sufficient to allege a *Section 2* violation. The reservation of space necessarily excludes, and is intended to exclude, producers of lumber of all kinds, including green hem-fir, and suppliers of all other goods for that matter, from using that same shipping space. There is no allegation that Doman did not ship lumber in the reserved space or did not do so in order to sell the lumber. Firms do not violate the antitrust laws by meeting customers' demands even when the use of available shipping facilities may make it more difficult for competitors.

d) Tying

Appellants also assert antitrust violations based on an alleged tying scheme. They claim that Doman has allowed Sherwood to purchase green hem-fir lumber at a reduced price so that Sherwood can tie the sales of green hem-fir lumber to the sales of "finished wood products."

A tying arrangement is "'an agreement by a party to sell one product but only on the condition that the buyer also purchase[] a different (or tied) product.'" *Yentsch v. Texaco, Inc., 630 F.2d 46, 56 (2d Cir. 1980)* (quoting *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*. We have required plaintiffs claiming an illegal tying arrangement to show: "first, a tying and a tied product; second, evidence of actual coercion by the seller that forced the buyer to accept the tied product; third, sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; fourth, anticompetitive effects in the tied market; and fifth, the involvement of a 'not insubstantial' amount of interstate commerce in the 'tied' market." *De Jesus v. Sears, Roebuck & Co., 87 F.3d 65, 70 (2d Cir. 1996)* (quoting *Gonzalez v.*

St. Margaret's House Hous. Dev. Fund Corp., 880 F.2d 1514, 1516-17 (2d Cir. 1989)).

Appellants' complaint alleges that green hem-fir lumber is the tying product and "finished wood products" are the tied products. While green hem-fir lumber is a product with a useable definition that gives notice to the appellees of the alleged tying product, "finished wood products" is a term that covers an enormous variety of goods with an enormous number of uses. n5 The phrase is exceptionally broad and vague, potentially encompassing hundreds of different products, and the complaint does not attempt to define the phrase or even narrow the range of things or products to which the phrase might refer. Appellants, moreover, have not specified in the complaint, and declined to do so at oral argument, precisely which of this vast range of products appellee has tied to green hem-fir lumber.

n5 We note that, according to the World Forestry Institute, "[t]he finished wood products market -- which includes furniture, flooring, beams, windows, doors, frames, moulding and millwork -- is a $ 28 billion industry." See http://wfi.worldforestry.org/ trade-2.htm (last visited Oct. 5, 2006). One prominent online directory for timber-related products lists all of the following under "finished wood products": windows, doors, stairs, steps, handrails, parquet, wooden floors, wooden houses, pallets, tare, packaging, boxes, saunas, barrels, tubs, wooden tables, kitchen tools, toys, artwork, straw, plaiting, wickerwork, wooden musical instruments, fences, gates, railing, pellets, briquettes, and "other." See www.wood-me.com/timber_cat/9/Finished_ wood_products (last visited Oct. 5, 2006).

Notice pleading requires at a minimum that the pleading give the opposing party notice of the nature of the claim against it, including which of its actions gave rise to the claims upon which the complaint is based. The claim must be sufficiently particular to allow the defendant to commence discovery and prepare a defense. See *Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988).*

The complaint is therefore insufficient to allege a tying violation. Even under notice pleading, an antitrust defendant charged with illegal tying is entitled to some specificity as to the conduct alleged to be coercive, the customers who would have purchased a product elsewhere but for the coercion, the particular products sold as a result of the coercion, the anticompetitive effects in a specified market, and the effect on the business of the plaintiff. See *Mountain View Pharmacy v. Abbott Labs., 630 F.2d 1383, 1387-88 (10th Cir. 1980)*. This complaint does not do this. Its allegations make no attempt to define the conduct alleged to be unlawful and potentially involve every sale by Sherwood during the period covered by the complaint. The allegation is therefore insufficient to survive a motion to dismiss. *Paycom Billing Servs. v. Mastercard Int'l, Inc., 467 F.3d 283, 2006 WL 3041938 (2d Cir. 2006)* (noting that, though pleading rules are permissive, they do not allow "conclusory statements to substitute for minimally sufficient factual allegations").

e) Robinson-Patman Act

Plaintiffs' claim under the Robinson-Patman Act, *15 U.S.C. § 13*, was also properly dismissed. As a threshhold issue, plaintiffs have no standing to assert any claims under the Robinson-Patman Act because that statute applies only to price discrimination between different purchasers. *15 U.S.C. § 13(a)*. "[C]onsignment contracts are not covered." Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice § 14.6d n. 31 (2d ed. 1999). This requirement applies not just to *Section 2(a)* but also to the other provisions of the Robinson-Patman Act. "Preferences granted to a legitimate sales agent are not actionable [under the Robinson-Patman Act] because there is no sale to the agent." *Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 371-73 (3d Cir. 1985)* (noting that the rule applies to *subsections 2(a), (c), (e)*, and *(f)*). According to the complaint, "E&L's arrangement with Doman and Eacom was that E&L would take delivery, but not

ownership, of the green hem-fir lumber products ... and would then sell this product on Doman's behalf to lumberyards." By E&L's own admission, it was merely a sales agent, and thus it cannot assert a claim under the Robinson-Patman Act.

Even if plaintiffs did have standing, their claim would still fail. The Act contains a number of provisions, but the allegation that Doman has offered Sherwood "discounted and/or favorable price structuring levels" implicates only *Section 2(a). 15 U.S.C. § 13(a). Section 2(a)* makes it "unlawful ... to discriminate in price between different purchasers of commodities of like grade and quality ... where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly...." *15 U.S.C. § 13(a).* A necessary component of a *Section 2(a)* claim is "likelihood of competitive injury resulting from the alleged discrimination." *Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 584 (2d Cir. 1987).* Because plaintiffs have failed to allege any facts that could demonstrate competitive injury, their claim under *subsection 2(a)* of the Robinson-Patman Act must fail.

f) Remaining Claims

Plaintiffs also asserted a federal claim for violations of *Section 7* of the Clayton Act, *15 U.S.C. § 18.* That section addresses mergers and the acquisition by one corporation of the stock of another. Nothing in the plaintiffs' complaint relates to anything in *Section 7*, and consequently that claim was properly dismissed.

With all federal claims dismissed, the dismissal, without prejudice, of the remaining state claims was proper. *28 U.S.C. § 1367(c)(3); Giordano v. City of New York, 274 F.3d 740, 754 (2d Cir. 2001)* ("[T]he state-law claims should be dismissed so that state courts can, if so called upon, decide for themselves whatever questions of state law this case may present.").

CONCLUSION

We therefore affirm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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E&L CONSULTING, LTD., d/b/a C.B.C. LUMBER, CO.; and C.B.C. WOOD PRODUCTS, INC.,

Plaintiffs,

- against -

DOMAN INDUSTRIES LIMITED; EACOM TIMBER SALES LTD.; AND SHERWOOD LUMBER CORP.,

Defendants.

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MEMORANDUM AND ORDER

Civil Action No. CV-04-0594 (DGT)

TRAGER, J.

E&L Consulting, Ltd. d/b/a C.B.C. Lumber, Co. ("E&L") and C.B.C. Wood Products, Inc. ("CBC") (collectively, "plaintiffs") bring this action against Doman Industries Ltd., Eacom Timber Sales Ltd. and Sherwood Lumber Corp. (collectively, "defendants"). Plaintiffs allege violations of antitrust statutes (both federal and state), breach of contract and tortious interference with contract. Presently presented are defendants' motions to dismiss pursuant to *Rule 12(b)(6), Fed. R. Civ. P.*, for failure to state a claim.

Background

The following facts are taken from plaintiffs' amended complaint and are presumed to be true for purposes of these motions to dismiss. Plaintiffs are New York corporations that sell either lumber or finished-wood products in New York, New Jersey and Pennsylvania. Amended Complaint ("Am. Cplt.") PP3, 4. E&L sells lumber; CBC sells finished-wood products. Doman

Industries Limited ("Doman") and its wholly owned subsidiary, Eacom Timber Sales Ltd. ("Eacom") (collectively with Doman, "the Doman defendants"), are Canadian corporations with offices in British Columbia engaged in selling lumber products in, inter alia, New York, New Jersey, Connecticut, Rhode Island, Maryland, Delaware and Pennsylvania (collectively, the "Northeastern United States"). Am. Cplt. PP5, 6; Memorandum of Law of Doman Industries and Eacon Timber Sales In Support of Their Motion to Dismiss the Amended Complaint ("Doman Br.") at 2. Defendant Sherwood Lumber Corp. ("Sherwood"), a New York corporation, sells both lumber and finished-wood products in the Northeastern United States. Am. Cplt. P7. As a seller and importer of lumber and finished-wood products, Sherwood competes with both E&L (in the sale of lumber) and CBC (in the sale of finished-wood products).

The instant dispute arises out of a contractual agreement between E&L and the Doman defendants. Beginning in 1990, Doman (and, later, Eacom) began to provide E&L with "green hem-fir" lumber, an inexpensive (or, as plaintiffs allege, formerly inexpensive), durable product used for home-building. Am. Cplt. PP9, 10. Plaintiffs allege that green hem-fir lumber is a unique natural resource lacking in substitutes, Am. Cplt. PP10, 23, and that the Doman defendants "supply over 95 percent of the green hem-fir lumber available for sale in [the Northeastern United States]." Am. Cplt. P11.

Under the parties' agreement, E&L would take delivery (but not ownership) of green hem-fir lumber and sell the product on the Doman defendants' behalf to E&L's customers in New York, New Jersey and Pennsylvania, Am. Cplt. PP8, 12, for which E&L would receive set monthly payments and a commission. Am. Cplt. P12. This agreement was memoralized in a three-year contract that took effect on January 1, 2003. n1 Am. Cplt. PP13, 14. Among its

provisions, the contract required 90 days' notice prior to cancellation. Am. Cplt. P14.

n1 Plaintiffs allege "on information and belief" that the Doman defendants entered into similar arrangements with Atlantic Coast Lumber Co. and Futter Lumber, see Am. Cplt. P15, distributors not parties to this litigation. Defendants argue that such allegations on information and belief are insufficient as a matter of law. See Doman Br. at 13 & n. 8. However, courts have routinely considered claims made on information and belief. *Langadinos v. American Airlines, Inc., 199 F.3d 68, 73 (1st Cir. 2000)* ("a plaintiff can make allegations either on the basis of personal knowledge or on 'information and belief'"); see also *Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369, 1372 (10th Cir. 1979); Carroll v. Morrison Hotel Corp., 149 F.2d 404, 406 (7th Cir. 1945).*

According to plaintiffs, Sherwood approached E&L about a merger in 1998. When negotiations were unsuccessful, plaintiffs allege that Sherwood and the Doman defendants conspired to "begin a process to monopolize the green hem-fir lumber market, as well as the finished-wood product market, in the United States." Am. Cplt. P18. According to plaintiffs, this monopolization scheme involved decisions by the Doman defendants to (1) provide Sherwood with favorable price schedules so that it could sell green-hem fir lumber more cheaply than E[L] (2) cancel contracts with all distributors operating in the Northeastern United States so that Sherwood could operate out of the ports formerly used by these other distributors; (3) make Sherwood the sole distributor of green hem-fir lumber in the Northeastern United States; (4) block plaintiffs' access to substitute products by reserving all available cargo shipping mechanisms that could carry alternative sources of green hem-fir lumber to the Northeastern United States; (5) allow Sherwood to raise the price of green hem-fir lumber; and (6) allow Sherwood to tie the sale of green hem-fir lumber to the sale of other finished-wood products. Am. Cplt. PP19-28,

33-35. Plaintiffs allege that this conspiracy caused end-users of lumber and finished-wood products to pay artificially inflated prices. Am. Cplt. P39.

Plaintiffs allege that, on January 30, 2004, the Doman defendants, citing an unspecified breach by E&L, terminated the contract without providing the required 90 days' notice. Am. Cplt. P25. The Doman defendants then sent a letter to E&L's customers informing them "that effective immediately Sherwood would be the exclusive distributor" of its products in the Northeastern United States. Am. Cplt. P27. n2

n2 Plaintiffs allege that at the time of termination, E&L was planning to take delivery of 10,000,000 board feet of Doman lumber (presumably green hem-fir lumber) in Red Hook, New York, and that another shipment of 6,000,000 feet of lumber was expected to arrive in February 2004. Plaintiff initially sought a temporary restraining order, which was denied on February 17, 2004. See Dkt. No. 2. During the February 17, 2004, proceedings, the court set a preliminary injunction hearing for March 11, 2004. In a letter dated February 23, 2004, plaintiffs withdrew their motion for a preliminary injunction. See letter from E. Christopher Murray, dated February 23, 2004.

Plaintiffs allege that after the Doman defendants cancelled their contract with E&L, Sherwood raised the price of green hem-fir lumber by somewhere between 20 and 50 percent. See Am. Cplt. P36 ("the price of green hem-fir lumber was raised by Sherwood in many cases by over 20 percent"); Affidavit of Robert Cook dated July 6, 2004 ("Cook Aff.") P2 ("Sherwood's recent price information demonstrates that the price of green hem-fir lumber has increased by over 50 percent since E&L was prohibited from purchasing green hem-fir lumber from Doman.").

Plaintiffs further allege that they have been unable to procure green hem-fir lumber from other domestic suppliers or from Canada. As far as the Canadian suppliers are concerned, plaintiffs allege that defendants have stymied

efforts to obtain green hem-fir lumber from Canada by reserving all potential cargo space on the sole shipping carrier permitted to transport green hem-fir lumber from Canada to New York, Saga Forest Carriers. Am. Cplt. PP33-35; Cook Aff. P3. As far as domestic lumber is concerned, the only company other than Doman that supplies green hem-fir lumber - TimberWest - has an extremely small inventory, which must be shipped by rail, a form of transport that is ten percent more expensive. Am. Cplt. PP29-30. Plaintiffs do not allege that defendants are impeding customers' efforts to import TiberWest lumber by rail; consequently, TimberWest appears to be a viable, if slightly more expensive, alternative. n3

n3 However, an affidavit by Mr. Cook (president of both E&L and CBC) does contain an additional detail suggesting that defendants do somehow control the shipment of green hem-fir lumber by rail. According to Mr. Cook, "Doman is now charging $ 60 to $ 80 per MBF greater for any lumber that is transported by rail, as opposed to by ship. Thus, green hem-fir lumber that is transported by rail is at least 20 to 30 percent more expensive than green hem-fir lumber that is transported by ship." Cook Aff. P3. This statement implies that the price of lumber shipped by rail is controlled by the Doman defendants rather than the result of increased costs due to the use of rail transportation. However, read as implied, the statement contradicts the amended complaint when discussing TimberWest lumber. See Am. Cplt. P29 ("the only way for Timber West [sic] to deliver green hem-fir lumber is by rail, which increases the cost of green hem-fir lumber by more than 10 percent ... [and] is thus not a comparative or substitute product").

Plaintiffs also state that the only other substitutes for green hem-fir lumber - Douglas Fir and KD Hem Fir - cost 25 percent more and that "the price elasticity of lumber precludes these products from being adequate substitutes for green hem-fir lumber." Am. Cplt. PP31, 32. In any event, plaintiffs claim that any seemingly comparable products to

green hem-fir lumber "are not adequate for use when the lumber will be exposed to the elements for a long time such as being utilized to frame houses." Am. Cplt. P32. In short, plaintiffs imply that green hem-fir lumber is a one-of-a-kind resource.

Plaintiffs allege violations of state and federal antitrust statutes; namely, conspiracy and restraint of trade in violation of the Sherman Act, *15 U.S.C. § 1*; monopolization in violation of the Sherman Act, *15 U.S.C. § 2*; use of market power to prevent competitors from utilizing transportation systems in violation of *15 U.S.C. § 18*; unlawful tying in violation of the Sherman Act; and unlawful tying in violation of the Robinson Patman Act, *15 U.S.C. § 13*. Plaintiffs also bring claims under state law for violations of the Donnelly Act, *N.Y. Gen. Bus. Law § 340*; breach of contract by the Doman defendants and tortious interference with a contract by Sherwood.

Defendants move to dismiss the amended complaint for failure to allege a relevant geographic or product market; failure to adequately allege antitrust injury or standing; failure to state a claim under *Section 1 of the Sherman Act*; failure to state a claim under *Section 2 of the Sherman Act*; failure to plead the necessary elements of a violation under *Section 7 of the Clayton Act*; failure to plead the necessary elements of a tying claim; failure to plead the necessary elements of a *Robinson-Patman Act* violation; failure to state a claim for a violation of the *Donnelly Act*; failure to plead the necessary elements of a breach-of-contract claim (this claim is brought only against the Doman defendants); and failure to state a claim for tortious interference with a contract (this claim is brought against Sherwood).

On November 7, 2002, Doman entered into bankruptcy proceedings pursuant to the Companies' Creditors Arrangement Act ("CCRA"). On December 6, 2002. the Supreme Court of British Columbia ordered that "no suit... or proceeding of any other nature ... shall be proceeded with or commenced against any of the

Petitioners." Affidavit of Kelly M. Hnatt dated June 7, 2004 ("Hnatt Aff.") Ex. 2 P4(c); Doman Br. at 3. Doman argues that all claims against it must be dismissed under principles of comity.

Discussion

(1) Comity

Comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot, 159 U.S. 113, 159, 40 L. Ed. 95, 16 S. Ct. 139 (1895)*. This is especially the case for bankruptcy proceedings: "American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities." *Cunard S.S. Co. v. Salen Reefer Services AB, 773 F.2d 452, 458 (2d Cir. 1985)*. See also *Allstate Life Ins. Co. v. Linter Group Ltd., 994 F.2d 996, 999 (2d Cir. 1993)*, cert. denied, *510 U.S. 945 (1993)* ("We have recognized that comity is particularly appropriate where, as here, the court is confronted with foreign bankruptcy proceedings.").

"Comity will be granted to the decision or judgment of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated." *Cunard, 773 F.2d at 457* (citing cases). This certainly holds true for "Canada, a sister common law jurisdiction with procedures akin to our own." *Clarkson Co. v. Shaheen, 544 F.2d 624, 630 (2d Cir. 1976)*. As Judge Batts noted in *Tradewell, Inc. v. American Sensors Electronics, 1997 U.S. Dist. LEXIS 10890, 1997 WL 423075 (S.D.N.Y. July 29, 1997)*, Canada's bankruptcy procedure under the CCRA satisfies the standards of procedural fairness established under the law of this circuit. See *1997*

U.S. Dist. LEXIS 10890, [WL] at *2 - *3 (citing *Allstate, 994 F.2d at 999*). n4

n4 It should be noted that this circuit does not require that foreign "liquidation proceedings be identical to United States bankruptcy proceedings." *Allstate, 994 F.2d at 999*; see also *In re Petition of Brierley, 145 B.R. 151, 166 (Bankr. S.D.N.Y. 1992)* ("nothing dictates that the foreign law be a carbon copy of our law").

As a preliminary matter, plaintiffs do not argue that they will be materially disadvantaged by the Canadian proceedings. Instead, they assert that comity does not apply in this case because the antitrust allegations at bar "could not be enforced in the Canadian bankruptcy proceeding." Memorandum of Law in Opposition to Defendant's Motion to Dismiss ("Plaintiff Br.") at 8. Plaintiffs apparently believe that the antitrust issues they raise cannot adequately be resolved under the CCRA proceeding. But plaintiffs proffer no evidence why the Canadian courts are ill-equipped to apply U.S. antitrust law. They cite no case law or provision of the CCRA that would preclude them from asserting such a claim. Also, as noted by defendants, U.S. courts have accorded comity to foreign bankruptcy proceedings in other cases raising purportedly "unique" federal causes of action. The Allstate court affirmed a trial judge's decision to dismiss a case alleging claims under the federal securities laws in light of the pendency of Australian bankruptcy proceedings. *994 F.2d at 998-1000*. That court also approvingly cited a bankruptcy judge's decision dismissing a securities action in favor of an English bankruptcy proceeding in *Lindner Fund, Inc. v. Polly Peck Int'l PLC, 143 B.R. 807, 810 (Bankr. S.D.N.Y. 1992)*. And, in Tradewell, the court invoked comity to stay a breach-of-contract claim. *1997 U.S. Dist. LEXIS 10890, 1997 WL 423075*, supra. These decisions foreclose plaintiffs' argument that comity does not apply because they "are not simply creditors of the defendants." See Pl. Br. at 8. n5

N5 Plaintiffs also argue that "the Canadian Bankruptcy Court does not have jurisdiction ... to adjudicate claims involving conduct within the United States." Plaintiff Br. at 10. But plaintiffs fail to show why that is the case. Plaintiffs also try to analogize this case to various exceptions to the automatic stay provisions enshrined in the U.S. Bankruptcy law, see Pl. Br. at 11 (citing *11 U.S.C. § 362(b)(1)* and *(4)*), but those provisions only exempt criminal and government suits, not private civil suits.

According to defendants, plaintiffs "are clearly identified as potential creditors in Doman's Canadian bankruptcy proceeding." Doman Br. at 6. In that regard, defendants provide a list of potential creditors, all of whom received copies of claim forms. That list includes CBC. See Hnatt Aff. Ex. 3 (Affidavit of Kibben Jackson dated May 28, 2004, Ex. A). Plaintiffs do not allege lack of notice of the bankruptcy proceedings, and they do not dispute defendants' argument that plaintiffs received notification.

Extending comity to the Canadian proceeding does not "frustrate an important public policy of the United States," Pl. Br. at 11. Plaintiffs can assuredly ask the Canadian tribunal to apply either foreign law, something U.S. courts do all the time, see *Fed. R. Civ. P. 44.1*, or Canada's own Federal Competition Act, Canada's equivalent statute. See R.S.C. 1985, c.C-34. In sum, plaintiffs have demonstrated neither prejudicial result from staying proceedings against Doman nor any other convincing reason why the general presumption favoring comity should be disturbed. Were this court to have jurisdiction over the federal antitrust allegations, it would send all claims against the Doman defendants (both federal and state) to Canada, where the bankruptcy proceedings are already underway.

Nevertheless, the Doman defendants' arguments regarding comity have no impact on the numerous antitrust allegations also asserted against Sherwood. In order to avoid unnecessary duplicative litigation and, as explained infra, because all of plaintiffs' antitrust allegations are insufficient

to state a claim as a matter of law, the antitrust claims against both defendants will be resolved on substantive (antitrust) rather than procedural (comity) grounds. n6

n6 As explained infra, any remaining state law claims against the Doman defendants would have to be brought in Canada.

(2) The Alleged Antitrust Violations

Defendants argue, first, that plaintiffs' allegations do not state a claim under antitrust laws because they fail to allege and define the product market. Defendants further argue that, in any event, these allegations do not make out an injury under the antitrust laws.

(a) Relevant Market

A relevant market is comprised of a geographic market and a relevant product market. "The 'geographic market' is simply the geographic area where the competition occurs." *Beyer Farms, Inc. v. Elmhurst Dairy, Inc., 142 F. Supp. 2d 296, 303 (E.D.N.Y. 2001)*, aff'd, *35 Fed. Appx. 29 (2002)* (citing *North Jersey Secretarial School v. McKiernan, 713 F. Supp. 577, 583 (S.D.N.Y. 1989)).* Plaintiffs' allegation that the geographic market consists of the Northeastern United States is sufficient for purposes of this motion. Id.

With respect to product market, "if a complaint fails to allege facts regarding substitute products, to distinguish among apparently comparable products, or to allege other pertinent facts relating to cross-elasticity of demand ... a court may grant a *Rule 12(b)(6)* motion." Id. Although "extensive analyses of reasonable interchangeability and cross elasticity of demand ... are not required at the pleading stage," *Envirosource, Inc. v. Horsehead Resource Dev. Co., 1997 U.S. Dist. LEXIS 12570, 1997 WL 525403 *3 (S.D.N.Y. Aug. 21, 1997)*, "an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes - analysis of the interchangeability of use or the cross-elasticity of demand - and it must be plausible." *Todd v. Exxon Corp., 275 F.3d*

191, 200 (2d Cir. 2001) (internal citations and quotation marks omitted).

Defendants argue that plaintiffs refer to several different markets without adequately identifying "the supposed relevant market upon which plaintiffs rely in connection with their antitrust claims." Doman Br. at 11. That is not the case. Plaintiffs allege a monopoly involving "a specific natural resource - green hem-fir lumber" and unlawful tying of green hem-fir lumber with market of finished-wood products. Pl. Br. at 11-12. Defendants also argue, more persuasively, that the amended complaint fails to plead a relevant market in economically meaningful terms by failing to allege any facts regarding the "product[s] a customer will (or will not) switch in response to a supposed price increase in green hem-fir." Doman Br. at 11 (citing *Discon Inc. v. NYNEX Corp., 86 F. Supp. 2d 154, 160 (W.D.N.Y. 2000)*. That claim more adequately captures the deficiency in plaintiffs' complaint. As an initial matter, plaintiffs fail to cite a single case or other precedent supporting the market definition advanced in their pleadings. Moreover, and more seriously, plaintiffs' allegations regarding the product market are contradicted by other facts set forth in their own complaint.

Plaintiffs allege that defendant Sherwood has raised the price of green hem-fir lumber at least by 20 percent (according to the amended complaint, see Am. Cplt. P36), and perhaps by as much as 50 percent (see Cook Aff. P2). At the same time, plaintiffs allege that green hem-fir lumber shipped by rail, or substitute products like Douglas Fir and KD Hem Fir, cost between 10 and 25 percent more than green hem-fir lumber. Am. Cplt. PP29-32.

Plaintiffs nowhere allege, much less demonstrate, how the price increases would exclude competitors who sell close substitutes, like green hem-fir lumber shipped by rail, Douglas Fir or KD Hem Fir. Moreover, their own allegations regarding the paucity of suppliers of green hem-fir lumber outside the Northeastern United States (they allege that there

is the only one such supplier) suggest that green hem-fir lumber is not the unique product they claim it to be.

Even if the dramatic price increases wrought by Sherwood had a detrimental impact on market-wide competition for green hem-fir lumber within the Northeastern United States, the cost increase associated with that monopoly would render the alternate sorts of lumber more competitive, eventually driving out all business for green hem-fir lumber. Under the circumstances alleged in plaintiffs' complaint, Sherwood would have effectively priced itself out of the market. n7 Because plaintiffs do not allege a lack of supply of these alternative sources of wood, there is no reason why purchasers of green hem-fir will not chose substitute lumber to fill their demand. In short, there appear to "be other avenues available to competing manufacturers to distribute their product." *Anheuser-Busch, Inc. v. G.T. Britts Distributing, Inc., 44 F. Supp. 2d 172, 176 (N.D.N.Y. 1999).*

n7 Accordingly, plaintiffs' tying claim would also fail. Once Sherwood's dominance over the green hem-fir lumber were disrupted by competitors, Sherwood would have no power to illegally tie the sale of green hem-fir lumber to its finished-wood products.

Plaintiffs rest on the allegations in their amended complaint (and appear to add at least one new fact), n8 asserting that they adequately "define a geographical market for a unique natural resource which give rise to the claims of anti-competitive conduct by the defendants." Pl. Br. at 13. Missing from this analysis is any discussion, in "economically meaningful terms," *Discon, 86 F. Supp. 2d at 160*, supra, of "'cross-elasticity of demand between the product itself and substitutes for it.'" *Pepsico, Inc. v. Coca-Cola Co., 1998 U.S. Dist. LEXIS 13440, 1998 WL 547088, *5 (S.D.N.Y. Aug. 27, 1998)* (citing *Brown Shoe Co. v. United States, 370 U.S. 294 at 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502*). Plaintiffs do not adequately explain how the market for this "unique natural resource," i.e., green hem-fir lumber

"is so wholly segmented from the available substitutes that a rise in [its] price would not shift demand to some of the alternatives." *Carell v. Shubert Organization, Inc., 104 F. Supp. 2d 236, 266 (S.D.N.Y. 2000).*

n8 See Pl. Br. at 13 (noting "the ability of this product [green hem-fir lumber] to grow naturally in great quantities in certain terrain").

Furthermore, there is an additional reason why defendants' alleged 95 percent ownership of the green hem-fir lumber market within the Northeastern United States would not translate into monopoly power. According to plaintiffs' complaint, TimberWest is the only alternate supplier of green hem-fir lumber, and its own inventory is "extremely small" compared to Sherwood. See Am. Cplt. PP29-30. Assuming the truth of those facts, there would appear to be a serious shortage of green hem-fir lumber for the construction of homes outside the Northeastern United States. And yet, home-builders outside that region (including, of course, states bordering the Northeastern states, where temperature and climates are similar) seem able to obtain sufficient materials to perform their work. End-users in these areas obviously use something for home-building, and whatever these substitute products might be - perhaps they are Douglas Fir or KD Hem Fir, green-hem fir lumber delivered by rail, or another product n9 - plaintiffs' complaint does not even attempt to explain why these products are not appropriate for end-users within the Northeastern United States. Putting aside the possibility that a limited supply of green hem-fir lumber requires end-users outside the Northeastern United States to resort to the world of the second-best (something plaintiffs do not maintain), plaintiffs' definition of the market appears to leave out viable substitutes used in the construction of homes in other parts of the country. Under the circumstances, and as a matter of common sense, plaintiffs have not considered the realm of "substitute products ... or distinguished among apparently comparable products or ... allege other pertinent facts related

to cross-elasticity of demand." *Beyer Farms, 142 F. Supp. 2d at 303* (internal quotation marks omitted).

n9 Indeed, during oral argument, counsel for plaintiffs opined that end-users in such areas likely use green hem-fir lumber as well.

(b) Antitrust Injury and Standing

Nonetheless, assuming, arguendo, that plaintiffs have adequately alleged a viable product market - green-hem fir lumber within the Northeastern United States - they must still allege antitrust injury and demonstrate standing to sue. In doing so, plaintiffs must show more than mere injury to their own interests. They must allege "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. See also *Balaklaw v. Lovell, 14 F.3d 793, 797 (2d Cir. 1994)* ("It is now well settled that in order to have standing to prosecute private antitrust claims, plaintiffs must show more than that the defendants' conduct caused them an injury."). Plaintiffs must allege harm to the general market that has, in turn, harmed their own interests.

First, it must be noted that the type of exclusive distributorship alleged here does not, standing alone, demonstrate antitrust injury. On the contrary, "exclusive distributorship arrangements are presumptively legal." *Electronics Communications Corp. v. Toshiba America Consumer Products, Inc., 129 F.3d 240, 245 (2d Cir. 1997)*; see also *United States v. VISA U.S.A., Inc., 344 F.3d 229, 241 (2d Cir. 2003)*; *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978)* (en banc). n10 As the Second Circuit noted in Electronics Communications, "manufacturers must enjoy some freedom to determine how to distribute their products without subjecting themselves to attack under the antitrust laws by disappointed distributors,

absent activity that is manifestly anticompetitive." *129 F.3d at 245-46.*

n10 As the Fifth Circuit has stated: "Lest any other former distributors succumb to the temptation of treble damages, we reiterate that it is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business." *Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1249 (5th Cir. 1975).*

"For an exclusive dealership arrangement to cause a harm to competition (and overcome the presumption of legality), it must prevent competitors from getting their products to consumers at all." *VISA, 344 F.3d at 242* (emphasis added). In this case, E&L has no product to bring to market, and neither it nor any other supposed competitor is prevented from reaching customers as a result of defendants' conduct. n11 This case, instead, "is essentially a dispute about the way one product is distributed, a question of intrabrand competition." *Electronics Communications Corp., 129 F.3d at 244.* Absent allegations of horizontal price-fixing - and there are none here - there is nothing actionable in the selection of Sherwood as exclusive distributor. *Id. at 243.* In fact, this circuit has specifically noted certain advantages of vertical restrictions, which "promote interbrand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products." *Oreck, 579 F.2d at 131.*

N11 Plaintiffs' allegation that E&L was denied the opportunity to purchase green hem-fir lumber outright (as opposed to simply distributing the lumber), see Pl. Br. at 14; Am. Cplt. P24, does not change the analysis. For antitrust purposes, there is no allegation of a competitor unable to bring its product to market as a result of defendants' conduct.

Noting that "exclusive sale agreements, absent a purpose to set prices, are determined under the rule of

reason," Pl. Br. at 15, plaintiffs seek "an examination to see if the exclusive agreement has a reasonable main purpose." Id. at 16. But given the presumption, explained supra, of the validity of exclusive distributor agreements, plaintiffs must allege some reason why this examination is warranted based on a theory antitrust liability. Instead of doing so, they simply argue, repeatedly, that "this exclusive agreement was entered into to artificially inflate the price that the distributor ... could charge at the resale level." Pl. Br. at 17. See also id. at 1-2 (alleging defendants' monopolization and restraint of trade "to maintain an artificially high price structure"); id. at 7 (alleging use of monopoly power to "rapidly increase prices"). But this is not a theory of antitrust liability. Plaintiffs must allege some type of harm to competition market-wide. As far as the increase in the price of green hem-fir lumber is concerned, the Doman defendants, to the extent that they enjoy a natural monopoly over the sale of green hem-fir lumber, could conceivably raise prices without enlisting Sherwood. And, in any event, such a monopoly does not violate antitrust laws. *TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1024 (10th Cir. 1992)* ("a company does not violate the *Sherman Act* by virtue of the natural monopoly it holds over its own product"); see also *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)* (Although "one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product ... this ... is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product").

Plaintiffs rely on dicta in numerous circuit court cases for a host of rather unremarkable observations. For example, they cite VISA to underscore that "the fact that [exclusive distributor agreements] harm competitors does not, however, mean that they do not also harm competition."

Pl. Br. at 18 (citing *VISA, 344 F.3d at 243*). While this premise may hold logical validity, it does not bolster plaintiffs' case unless they can actually demonstrate some type of antitrust harm, which they do not. In any event, VISA is inapplicable to the case at hand. VISA involved business arrangements by credit-card companies that unquestionably barred competing issuers of credit cards from reaching potential consumers. Indeed, the Second Circuit noted that, absent such policies, the exclusive distributor agreements would not have raised antitrust concerns. *344 F.3d at 242*.

The case at bar is more akin to*Electronics Communications* and*Oreck*, both of which involved standard exclusive distributorship agreements where plaintiffs failed to allege market-wide harm that in turned caused injury to them. Although plaintiffs allege that the general market for green hem-fir lumber has been saddled with higher prices, and although E&L has obviously been harmed by the loss of its contract with the Doman defendants, plaintiffs make no allegation of a nexus between the harm plaintiffs have suffered and the supposed market-wide injury. Although plaintiffs allege that Sherwood has raised the price of green hem-fir lumber by 20 to as much as 50 percent, they do not describe any causal connection between the alleged price increase and the alleged monopolization scheme. Their only allegation regarding market-wide harm is the vague, repeated assertion that Sherwood has raised prices, without any indication of the type of harm this has had on the market or the ability (or lack thereof) of end-users to find substitute products. This allegation fails to demonstrate any type of harm to anyone other than plaintiffs, who are understandably disgruntled by the decision by the Doman defendants to select an alternate supplier for green hem-fir lumber.

Plaintiffs' allegations suffer from additional problems as well. They offer no explanation of what possible motive the Doman defendants have for allowing Sherwood to raise its prices in such an astronomical fashion without any

benefit to itself. The only plausible possibility would be a prior agreement whereby Doman would keep most, if not all, of the monopolistic profits. But plaintiffs make no allegation that the Doman defendants stood to benefit from this alleged scheme. On the contrary, they essentially argue that the Doman defendants fared worse under the conspiracy. After all, under the alleged scheme, it is less likely that end-users would continue to purchase Doman lumber through Sherwood given the astronomical price increases allegedly imposed by the new distributor.

Similarly, plaintiffs' tying argument suffers from the same deficiencies. Plaintiffs do not allege, let alone explain, how any decision on the part of Sherwood to require end-users to purchase its own finished-wood products as a condition for purchasing green hem-fir lumber would benefit the Doman defendants. Again, the alleged scheme would only frustrate the Doman defendants' interest in bringing green hem-fir lumber to market at the highest possible price that the market would permit. Furthermore, with respect to the Doman defendants, there is no allegation of "a tying and a tied product," a prerequisite to bringing such a claim. *De Jesus v. Sears, Roebuck & Co., 87 F.3d 65, 70 (2d Cir. 1996)*. In any event, it is hard to see how plaintiffs even possess standing to bring such a tying claim given that they are neither purchasers of green hem-fir lumber (having sold it on consignment) nor end-users of either green hem-fir lumber or finished-wood products.

The conclusory and, at times, implausible nature of plaintiffs allegations fail to establish any antitrust injury and are not sufficient to make out a claim under the antitrust laws, even at this early stage of the litigation.

(3) The Robinson-Patman Act

Plaintiffs' allegation that the Doman defendants, before reneging on their contract, sold lumber to Sherwood at prices lower than those they charged plaintiffs fails as well. It is dubious whether the Act even applies to claimants like plaintiffs, mere sales agents who never took ownership

or control of the lumber in question. See *National Auto Brokers Corp. v. General Motors Corp., 376 F. Supp. 620, 626 (S.D.N.Y. 1974)*, aff'd *572 F.2d 953 (2d Cir. 1978)*, cert. denied, *439 U.S. 1072 (1979)*. Even if plaintiffs did have standing to bring such a claim, the overall inadequacies about the alleged monopoly scheme simply do not hold up to scrutiny. As the Supreme Court has held, "a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*. Plaintiffs have not adequately alleged such an injury; consequently, this claim is denied as well.

(4) State Law Claims

Having dismissed the federal questions raised by plaintiffs, this court will not exercise supplemental jurisdiction over the remaining state law claims, as those issues are more properly adjudicated by state courts. See *28 U.S.C.A. § 1367(c)*; *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 348, 351-53, 98 L. Ed. 2d 720, 108 S. Ct. 614* & n. 7 (1988) ("in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine - judicial economy, convenience, fairness, and comity - will point toward declining to exercise jurisdiction over the remaining state-law claims"). With respect to the Doman defendants, however, for the reasons explained above, any state-law claims must be brought as part of the ongoing Canadian bankruptcy proceedings.

Conclusion

For the foregoing reasons, defendants' motions to dismiss the amended complaint are granted. Plaintiffs' federal antitrust claims and *Donnely Act* claim against both Doman and Sherwood are dismissed with prejudice. Plaintiff's remaining state law claim against Doman for breach of contract is dismissed without prejudice. Plaintiff's remaining state law claim against Sherwood for tortious

interference with contract is dismissed without prejudice. The Clerk of the Court is directed to close this case.

Dated: Brooklyn, New York
March 14, 2005

ORDERED:

/s/
David G. Trager
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

E&L CONSULTING, LTD., d/b/a C.B.C. LUMBER, CO.; and C.B.C. WOOD PRODUCTS, INC.,

Plaintiffs,

- against -

DOMAN INDUSTRIES LIMITED; EACOM TIMBER SALES LTD.; AND SHERWOOD LUMBER CORP.,

Defendants.

----------X

Filed in Clerk's Office U.S. District Court EDNY
Mar 29, 2005

JUDGMENT

CV-04-0594 (DGT)

A Memorandum and Order of Honorable David G. Trager, United States District Judge, having been filed on March 14, 2005, granting defendants' motions to dismiss the amended complaint; dismissing plaintiffs' federal antitrust claims and Donnely Act claim against both Doman and Sherwood with prejudice; dismissing plaintiffs' remaining state law claim against Doman for breach of contract without prejudice; and dismissing plaintiffs' remaining state law claim against Sherwood for tortious interference with contract without prejudice; it is

ORDERED and ADJUDGED that plaintiffs take nothing of the defendants; that defendants' motions to dismiss the amended complaint are granted; that plaintiffs' federal antitrust claims and Donnely Act claim against both Doman and Sherwood are dismissed with prejudice; that plaintiffs' remaining state law claim against Doman for breach of contract is dismissed without prejudice; and that plaintiffs' remaining state law claim against Sherwood for

tortious interference with contract is dismissed without prejudice.

Dated: Brooklyn, New York
March 23, 2005

/s/
ROBERT C. HEINEMANN
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Agreen
ACTING CLERK

Date:

Docket Number:	05-1751-cv
Short Title:	E&L Consulting, Ltd. v. Doman Industries Limited
DC Docket Number:	04-cv-594
DC:	EDNY (BROOKLYN)
DC Judge:	Honorable David Trager Honorable Kiyo Matsumoto

At a stated term of the United States Court of Appeal for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of February, two thousand seven.

E&L Consulting, Ltd., doing business as C.B.C. Lumber, Co. and C.B.C. Wood Products, Inc.

Plaintiffs-Appellants,

v.

Doman Industries Limited, Eacom Timber Sales Ltd. and Sherwood Lumber Corp.,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Plaintiffs-Appellants. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Thomas Asreen, Acting Clerk

By: /s/
Motion Staff Attorney

A TRUE COPY
Thomas W. Asreen, Acting Clerk

By: /s/
DEPUTY CLERK

CERTIFIED:

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE

TITLE 15. COMMERCE AND TRADE, CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

§ 2. Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

FEDERAL RULES OF CIVIL PROCEDURE

III. PLEADINGS AND MOTIONS

FED.R.CIV.P. R. 12

How Presented. (b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue,

(4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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E&L CONSULTING, LTD., d/b/a C.B.C. LUMBER, CO.; and C.B.C. WOOD PRODUCTS, INC.,

Plaintiffs,

-against-

DOMAN INDUSTRIES LIMITED; EACOM TIMBER SALES LTD.; AND SHERWOOD LUMBER CORP.,

Defendants.

----------X

AMENDED COMPLAINT

04 Civ 0594 (DGT)

TRIAL BY JURY DEMANDED

Plaintiffs, E & L Consulting, Ltd. d/b/a C.B.C. Lumber, Co. and C.B.C. Wood Products, Inc., by their attorneys, Reisman, Peirez & Reisman, L.L.P., as and for their amended complaint herein, allege:

Jurisdiction

1. This case arises under 15 U.S.C. §§ 1, 2, 13, 15 and 18, as well as New York *General Business Law* §340 *et seq.* and the common law of the State of New York. Jurisdiction is conferred on this Court by 28 U.S.C. §§1331, 1343 and 1367.

Venue

2. Venue is proper in this District pursuant to 28 U.S.C. §1391(b) in that the events giving rise to this action occurred in this District and a defendant resides in this District.

Parties

3. Plaintiff E & L Consulting, Ltd. d/b/a C.B.C. Lumber, Co. ("E&L") is a New York corporation with a

place of business located at 112 Newtown Road, Plainview, New York.

4. Plaintiff C.B.C. Wood Products, Inc. ("C.B.C.") is a New York corporation with a place of business located at 112 Newtown Road, Plainview, New York.

5. Upon information and belief, defendant Doman Industries Limited ("Doman") is a corporation organized under the laws of Canada, with a place of business located at 435 Trunk Road, Duncan, British Columbia, and regularly conducts business within in the State of New York and the United States by soliciting orders and shipping lumber products to, *inter alia*, New York, New Jersey, Connecticut, Rhode Island, Maryland, Delaware and Pennsylvania.

6. Upon information and belief, defendant Eacom Timber Sales Ltd. ("Eacom") is a corporation organized under the laws of Canada, is a wholly owned subsidiary of Doman, and maintains an office for conducting business at 12751 Vulcan Way, Richmond, British Columbia. Eacom regularly conducts business within in the State of New York and the United States by soliciting orders, entering into contracts, and shipping lumber products to, *inter alia*, New York, New Jersey, Connecticut, Rhode Island, Maryland, Delaware and Pennsylvania.

7. Upon information and belief, defendant Sherwood Lumber Corp. ("Sherwood") is a New York corporation with a place of business located at 300 Corporate Plaza, Islandia, New York 11749 and engages in selling lumber and finished wood products in, *inter alia*, New York, New Jersey, Connecticut, Rhode Island, Maryland, Delaware and Pennsylvania.

AS AND FOR A
FIRST CAUSE OF ACTION

8. E&L was founded in 1988 and beginning in 1990 entered into an arrangement with Doman and later its subsidiary, Eacom, to sell green hem-fir lumber in New York, New Jersey and Pennsylvania.

9. Green hem-fir lumber is an inexpensive and high quality lumber product, often utilized for home building, including the framing of houses, and is in great demand in the northeastern United States by end-users such as home builders.

10. There are no types of lumber which are substitutes for or comparable to green hem-fir because no other type of lumber combines the qualities that permit it to be used where it will be exposed to the elements over long periods of time while its natural growth and productivity permits an economical price structure.

11. Doman is a large manufacturer of lumber products and, upon information and belief, currently supplies over 95 percent of the green hem-fir lumber available for sale in New York, New Jersey, Connecticut, Rhode Island, Maryland, Delaware and Pennsylvania (hereinafter the "Northeastern United States").

12. E&L's arrangement with Doman and Eacom was that E&L would take delivery, but not ownership, of the green hem-fir lumber products at its port facility in Red Hook, Brooklyn, New York, and would then sell this product on Doman's behalf to lumberyards, at prices agreed upon by Doman, and in consideration, E&L would receive set monthly payments, together with a commission.

13. Prior to 1998, E&L did not have a written agreement with Doman and Eacom, but in 1998 a written agreement was entered into, and thereafter, renewed for a three-year period beginning January 1, 2003.

14. The written agreement provided in relevant part:

> "**Term:**
>
> • This contract will be in effect from January 1, 2003 to December 31, 2005.
>
> * * *
>
> **Remuneration:**
>
> • Domans would pay to C.B.C. $20,000.00 U.S. funds per month.

> • On all sales up to 4.0 million FBM per month and additional $ 1.00 per thousand board feet sold and invoiced would be paid.
> • On all sales over and above 4.0 million FBM per month, $2.00 per thousand board feet sold and invoiced would be paid to C.B.C.
> • C.B.C. would be responsible for their own expenses.
>
> * * *
>
> **Cancellation of Agreement:**
> • **Should either party for any reason wish to cancel this agreement the canceling party must give three months written and working notice as long as the terms and conditions as listed above are met**. There will be no payments beyond three months payment as listed under 'Remuneration' (which must be working notice).
> • If C.B.C. and/or Bobby Cook does not meet the terms and conditions set forth in this contract, Eacom Timber Sales reserves the right to cancel the contract and pay C.B.C. for the balance owing at the time of cancellation with no further payments owing to C.B.C." (emphasis supplied)

15. Upon information and belief, Doman entered into comparative arrangements with other companies. Atlantic Coast Lumber Co., located in Providence, Rhode Island, had a agreement with Eacom to sell green hem-fir lumber in the Northeastern United States on a commission basis, while Futter Lumber in Wilmington, Delaware, bought green hem-fir from Doman and then resold the product to lumberyards in the Northeastern United States.

16. In or about 2002, C.B.C. was organized to import and sell finished wood products, including Brazilian plywood. C.B.C. does not sell green hem-fir lumber, nor any other lumber products, which compete with the lumber transported to New York and sold by E&L.

17. Defendant Sherwood is in the business of selling in the Northeastern United States both lumber, such as the green hem-fir, and finished wood products like those marketed and sold by C.B.C., including Brazilian plywood. Accordingly, at all relevant times hereto, Sherwood directly competed with E&L in the Northeastern United States green hem-fir lumber market and with C.B.C. in the Northeastern United States finished wood product - specifically plywood - market.

18. In or about the spring of 1998, Sherwood approached E&L about purchasing its business, but negotiations were unsuccessful. Apparently, as a result, Sherwood approached Doman and began a process to monopolize the green hem-fir lumber market, as well as the finished wood product market, in the Northeastern United States.

19. Initially, in 1998, after Doman and Eacom had unilaterally ceased selling lumber to Atlantic Coast Lumber, Sherwood began operating at the port in New London, Connecticut, until that time utilized by Atlantic Coast Lumber, to purchase green hem-fir lumber products from Doman, reselling that product to lumberyards, as well as finished wood products such as plywood.

20. As a direct result, Atlantic Coast Lumber ceased operation, and, concurrently with Sherwood's take-over at New London, E&L was restricted by Doman and Eacom from selling into Sherwood's sales area.

21. Then, in or about July 2003, Doman and Eacom refused to deliver any more lumber by cargo ship to Futter, and designate Sherwood as the exclusive importer in New Jersey and Delaware of Doman green hem-fir lumber, again

precluding E&L from competing for customers in these states.

22. Further, upon information and belief, prior to January 2004, Doman and Eacom provided Sherwood with substantial discounts or favorable price structures for green hem-fir lumber as compared to the pricing Doman required of E&L, and prior to January 2004, Sherwood sold Doman lumber at substantially lower prices than Doman permitted E&L.

23. An example of the price discounts provided by Doman to Sherwood as compared to E&L is demonstrated by the fact that Doman required E&L to sell 2x6 units of green hem-fir lumber at $314, which Sherwood was selling 2x6 green hem-fir lumber at $296. Similarly, Doman required E&L to sell 2x8 units at $329, while Sherwood was selling these units at $315. There is no rational reason for this price discrepancy since E&L, which never took ownership of the lumber, had no mark-up, while Sherwood would have to mark up the product that it resold and pay part expenses in order to stay in business.

24. Additionally, Doman rejected E&L's request to purchase outright Doman green hem-fir lumber or Douglas Fir, while Doman sold those products to Sherwood.

25. Thereafter, on January 30, 2004, E&L received a letter terminating its agreement with Eacom based on an unspecified breach by E&L. The termination purported to be immediate, and the required 90-day notice to terminate the contract was not provided.

26. At the time of the termination, there were 10,000,000 board feet of Doman lumber located in Red Hook which E&L was about to sell, and another shipment of approximately 6,000,000 board feet which was to arrive in February 2004.

27. Immediately after terminating E&L's contract, Doman gave notice, by letter dated February 1, 2004, to E&L customers that effective immediately Sherwood would be the exclusive distributor of Doman's products in, *inter*

alia, Connecticut, New York and New Jersey, and Sherwood would now be the exclusive seller of Doman green hem-fir lumber in all the areas previously served by E&L, Futter and Atlantic Coast.

28. Upon information and belief, Sherwood then began contacting the customers of E&L and C.B.C. to sell its finished wood products, and Sherwood is now requiring customers who want to purchase green hem-fir lumber also purchase Sherwood finished wood products.

29. In an effort to mitigate the harm to E&L, and to find a replacement source of green hem-fir lumber, E&L immediately contacted other potential suppliers. However, the only other company which supplies green hem-fir lumber – Timber West – has only an extremely small inventory as compared to Doman.

30. Further, since non-United States shipping companies are not permitted to move cargo from the western United States to the Northeastern United States; since there are no United States companies that operate this route; and since, as explained *supra*, the only shipping carrier who transports lumber from Canada to the Northeastern United States refuses to carry non-Doman lumber, there are no cargo companies willing to ship lumber from Timber West to the Northeastern United States. As a result, the only way for Timber West to deliver green hem-fir lumber is by rail, which increases the cost of the green hem-fir lumber by more than 10 percent and, because of the price elasticity of lumber, rail delivered green hem-fir lumber is uncompetitive for resale as compared to green hem-fir lumber which is shipped, and rail delivered green hem-fir lumber is thus not a comparative or substitute product.

31. Further, other lumber suppliers such as Wareheuser, Boise and Hampton do not have green hem-firm lumber available, and products such as Douglas Fir and KD Hem Fir which can also be used for the framing of homes are 25 percent more expensive and the price elasticity

of lumber precludes these products from being adequate substitutions for green hem-fir lumber.

32. Also, there are no other forms of lumber which are comparable to green hem-fir because they are not adequate for use when the lumber will be exposed to the elements for a long period of time such as being utilized to frame houses.

33. On February 9, 2004, E&L contacted the only shipping line that transports lumber from Canada to New York, Saga Forest Carriers, in an attempt to have non-Doman lumber products shipped to E&L's facility in Red Hook. E&L was told by Saga that no shipments could be made for an indefinite period of time even though Saga is currently shipping Doman lumber to Brooklyn.

34. Accordingly, upon information and belief, Doman has reserved all potential cargo shipping mechanisms for the importation of green hem-fir lumber produced by any other manufacturer and only permitted the shipment of green hem-fir lumber that was being sold by Doman to Sherwood.

35. Upon information and belief, Doman's reservation of all potential shipping mechanisms for the lumber being sold to Sherwood was to prevent E&L or other distributors from locating an alternative supply of lumber so the defendants could monopolize the green hem-fir lumber market in the Northeastern United States.

36. Upon information and belief, as a direct result of and immediately after Doman and Eacom terminated the agreement with E&L, creating a monopoly by Sherwood for the sale of green hem-fir lumber in the Northeastern United States, the price of green hem-fir lumber was raised by Sherwood in many cases by over 20 percent, causing direct monetary injury to lumberyards, many of which are contractually committed to supply green hem-fir at fixed prices, as well as an artificial increase in prices for homebuilders and purchasers of new homes.

37. Upon information and belief, defendants have agreed and conspired among themselves to tie the purchaser of Doman green hem-fir lumber with the purchase of finished wood products from Sherwood, including plywood.

38. Further, defendants conspired and agreed among themselves that they would permit Sherwood to purchase green hem-fir lumber at a substantially reduced price so as to enable Sherwood to tie the sale of this product to the sale of finished wood products, such as plywood, and to drive Sherwood's competitors out of business.

39. As a result of defendants' conduct, end-users of lumber and finished wood products have less options to purchase their required supplies and are now required to pay artificially inflated prices.

40. Accordingly, defendants have conspired among themselves to restrain competition and trade for lumber and finished wood products in the Northeastern United States, *i.e.*, the States of New York, New Jersey, Connecticut, Rhode Island, Maryland, Delaware and Pennsylvania.

41. By reason of the above, defendants have violated 15 U.S.C. §1, and plaintiffs are entitled to treble damages in an amount to be determined but believed to exceed $3,000,000.

AS AND FOR A
SECOND CAUSE OF ACTION

42. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "41" of this Complaint as if fully set forth herein.

43. Defendants' conduct was undertaken in a concerted effort to achieve unlawful monopoly power in the green hem-fir lumber and finished wood product market in the Northeastern United States.

44. By reason thereof, defendants have violated 15 U.S.C. §2, and plaintiffs are entitled to treble damages in an amount to be determined but believed to exceed $3,000,000.

AS AND FOR A
THIRD CAUSE OF ACTION

45. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "44" of this Complaint as if fully set forth herein.

46. Defendants have utilized their market power to prevent competitors from utilizing transportation systems which would permit the shipment of green hem-fir lumber products to the Northeastern United States.

47. Defendants have undertaken this step to eliminate competition in the green hem-fir lumber and finished wood product market in the Northeastern United States.

48. By reason thereof, defendants have violated 15 U.S.C. §18, and plaintiffs are entitled to recover treble damages in an amount to be determined but believed to exceed $3,000,000.

AS AND FOR A
FOURTH CAUSE OF ACTION

49. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "48" of this Complaint as if fully set forth herein.

50. Upon information and belief, defendants have illegally tied the ability of consumers to purchase green hem-fir lumber to the requirement that they purchase finished wood products from Sherwood by refusing to sell green hem-fir lumber to any lumberyard that does not purchase finished wood products from Sherwood.

51. By reason of this illegal tying arrangement, defendants have violated 15 U.S.C. §§1 and 2, and plaintiffs are entitled to recover treble damages in an amount to be determined but believed to exceed $3,000,000.

AS AND FOR A
FIFTH CAUSE OF ACTION

52. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "51" of this Complaint as if fully set forth herein.

53. At all relevant times hereto, E&L faithfully performed under its agreement to sell Doman lumber.

54. Doman and Eacom's offering lumber for sale to Sherwood at discounted and/or favorable price structuring levels was undertaken in an effort by defendants to facilitate Sherwood tying the sale of Doman lumber to the sale of Sherwood finished wood products and driving competitive sellers of lumber products such as E&L out of business.

55. By reason thereof, defendants have violated 15 U.S.C. §13, and plaintiffs are entitled to recover treble damages in an amount to be determined but believed to exceed $3,000,000.

AS AND FOR A
SIXTH CAUSE OF ACTION

56. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "55" of this Complaint as if fully set forth herein.

57. Defendants have entered into a combination and/or association in order to monopolize the lumber and finished wood product markets in New York State.

58. Notice of this action is simultaneously being provided to the New York State Attorney General.

59. Defendants' conduct violates General Business Law §340, *et seq.*, and, by reason thereof, plaintiffs are entitled to recover treble damages in an amount to be determined but believed to exceed $1,000,000.

AS AND FOR A
SEVENTH CAUSE OF ACTION

60. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "59" of this Complaint as if fully set forth herein.

61. The termination by defendants Eacom and Doman of E&L's agreement to sell Doman lumber breached the applicable agreement between the parties.

62. By reason thereof, E&L is entitled to recover compensatory damages in an amount to be determined but believed to exceed $500,000.

AS AND FOR AN
EIGHTH CAUSE OF ACTION

63. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1" through "62" of this Complaint as if fully set forth herein.

64. In order to exert monopoly power over the finished wood product market in the Northeastern United States, Sherwood induced Doman to improperly and illegally terminate the agreement with E&L.

65. By reason thereof, Sherwood has tortiously interfered with E&L's contractual relationship, and plaintiff E&L is entitled to recover compensatory damages in an amount to be determined but believed to exceed $500,000.

WHEREFORE, plaintiffs demand judgment against defendants, as follows:

(a) On their first, second, third, fourth and fifth causes of action against defendants, jointly and severally, for treble compensatory damages in an amount to be determined but believed to exceed $3,000,000, and a preliminary and permanent injunction prohibiting defendants from entering into exclusive agreements for the sale of Doman products in the Northeastern United States, prohibiting defendants from terminating E&L's agreement to sell Eacom and Doman lumber except upon 90 days' notice, and prohibiting the distribution and diversion of approximately 16,000,000 board feet of lumber being supplied to E&L for resale in the Northeastern United States;

(b) On the sixth cause of action, against defendants, jointly and severally, for treble compensatory damages in an amount to be determined but believed to exceed $1,000,000;

(c) On the seventh and eighth causes of action, in favor of E&L, against defendants, jointly and severally, in an amount to be determined but believed to exceed $500,000, and a preliminary and permanent injunction prohibiting defendants from terminating E&L's agreement to sell Eacom and Doman lumber except upon 90 days' notice, and prohibiting the distribution and diversion of

approximately 16,000,000 board feet of lumber being supplied by E&L for resale in the Northeastern United States;

(d) Attorneys' fees for this action in an amount to be determined but believed to exceed $100,000;

(e) The costs and disbursements of this action; and

(f) Such other and further relief as the Court deems appropriate.

Dated: April 6, 2004

REISMAN, PEIREZ & REISMAN, L.L.P.

By: /s/ E. Christopher Murray
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(2)

No. 06-1549

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

E & L CONSULTING, LTD., doing business as C.B.C. LUMBER, CO. and C.B.C. WOOD PRODUCTS, INC.,

Petitioners,

v.

DOMAN INDUSTRIES LIMITED, EACOM TIMBER SALES LTD. and SHERWOOD LUMBER CORP.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether it is a violation of the Sherman Act, without a showing of actual adverse effect on competition market-wide, for a manufacturer to terminate one exclusive distributor, and to replace it with another.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners are E & L Consulting, Ltd. d/b/a C.B.C. Lumber, Co. and C.B.C. Wood Products, Inc. Respondents are Doman Industries Limited, Eacom Timber Sales Ltd., and Sherwood Lumber Corp.

Respondent Sherwood Lumber Corp. does not have any parent corporation and there is no publicly held company that owns 10% or more of the stock of respondent Sherwood Lumber Corp.

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals, Second Circuit, is reported at 472 F.3d 23. The opinion of the United States District Court, Eastern District of New York (Trager, J.), is reported at 360 F.Supp.2d 465.

JURISDICTION

The order of the Second Circuit denying plaintiff's petition for rehearing or for rehearing en banc was entered on February 20, 2007. The petition for writ of certiorari was filed on May 18, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1)

STATUTORY PROVISIONS

The relevant statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, as well as Fed. R. Civ. P. 12(b)(6).

STATEMENT

This action is a run-of-the-mill garden-variety jilted distributor case which does not require the attention of this Court. Accordingly, as explained below, the petition for a writ of certiorari should be denied.

Plaintiffs' amended complaint alleges that E & L Consulting, Ltd. ("E&L") became the distributor of defendant Doman Industries, Ltd. ("Doman") for green hem fir

lumber in 1990.[1] Amended Complaint, ¶8, Pet. App. 43. E&L "would take delivery, but not ownership of the green hem fir lumber," and sold it on consignment for commission. Amended Complaint, ¶12, Pet. App. 44. Plaintiffs' commission sales contract was terminable without cause upon 90 days notice, and with cause upon no prior notice. Amended Complaint, ¶14, Pet. App. 44-45. Plaintiffs' contract as a commissions sales agent was terminated by Doman effective January 30, 2004. Amended Complaint, ¶25, Pet. App. 47. Twelve days later, on February 11, 2004, plaintiff filed this antitrust action.

The amended complaint alleges that Doman controls at least 95% of the green hem fir lumber available for sale in the Northeast. Amended Complaint, ¶11, Pet. App. 44. Obviously, defendant Doman did not acquire its alleged 95% market share in the 12 days between January 30, 2004 and February 11, 2004. Plaintiff had no objection to serving as the exclusive distributor for Doman with respect to all green hem fir lumber delivered to the Red Hook port in Brooklyn for 14 years. Within 12 days of being replaced by Sherwood as Doman's distributor at the Red Hook port, however, plaintiffs suddenly complained that they were victims of an illegal monopoly.

After denying plaintiffs' application for a temporary restraining order, District Court Judge Trager granted defendants' motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), noting that plaintiffs had not adequately plead a product market. The court explained

---

[1] Green hem fir lumber is a lumber product manufactured from a combination of wood from the hemlock tree and various fir trees, hence "hem fir."

that "as a matter of common sense, plaintiffs have not considered the realm of 'substitute products . . . or distinguished among apparently comparable products, or. . . . allege other pertinent facts related to cross-elasticity of demand.'" Pet. App. 28-29. The District Court also held that plaintiff had not adequately alleged "antitrust injury." Pet. App. 29-33.

On December 15, 2006, the United States Court of Appeals, Second Circuit, affirmed the dismissal of plaintiffs' complaint "principally because appellants have failed to allege facts that, if proven, would demonstrate harm to competition." Pet. App. 2. The Second Circuit pointed out that "it is not 'a violation of the antitrust laws, without a showing of actual adverse effect on competition market-wide, for a manufacturer to terminate a distributor . . . and to appoint an exclusive distributor.' *Electronics Communs. Corp. v. Toshiba Am. Consumer Prods.*, 129 F.3d 240, at 244." Pet. App. 8.

After the Second Circuit denied plaintiffs' motion for a rehearing, or a rehearing *en banc*, plaintiffs filed their petition for a writ of certiorari to the Second Circuit. In an effort to attract the attention of the Court, petitioners claim that there is a split among the Second Circuit on the one hand, and the Sixth and Seventh Circuits on the other, with respect to the standard for evaluating exclusive distributorship agreements of alleged monopolists. In order to manufacture this supposed conflict, petitioners falsely characterize the Second Circuit's opinion in this case as one which effectively establishes a *per se* rule in favor of the legality of exclusive distributorships. In this regard, petitioners argue: "Thus, by its decision in this case, the Second Circuit has necessarily established a rule that exclusive distribution agreements are immune from

liability under the Sherman Act because the Second Circuit's reasoning would apply to and effectively bar a challenge under the Sherman Act to any exclusive distribution arrangement." Pet. 3.

Petitioners posit that this supposed *per se* rule of the Second Circuit is in conflict with the "rule of reason" standard applied in the Sixth and Seventh Circuits in cases such as *Byars v. Bluff City News Co.*, 609 F.2d 843, 860-863 (6th Cir. 1979), and *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 697 (2d Cir. 2006), *cert. den.*, 127 S. Ct. 1330 (2007). Pet. 10.

As explained *infra*, this is a feigned conflict among the Circuits which results from petitioners' mischaracterization of the holding of the Second Circuit in this case. The petition should be denied, as not only is the conflict feigned, but this action is a garden variety terminated distributor case which was properly decided.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS.

Plaintiffs' petition is premised entirely upon the proposition that the Second Circuit's decision in this case means that exclusive distributorships are *per se* legal when established by a monopolist. For example, petitioners pose the following as the sole question presented: "Whether an exclusive distributorship agreement can be challenged under the Sherman Act when it is alleged that the manufacturer has monopoly power over the supply of a unique product?" Pet. i. Thus, petitioners suggest that

under the Second Circuit's decision in this case an exclusive distributorship can never be challenged when the manufacturer has monopoly power. Petitioners warn that the Court of Appeals, Second Circuit, has now determined that all exclusive distribution agreements in the Second Circuit are "immune from liability under the Sherman Act." Pet. 3, 7. Plaintiffs' petition accuses the Second Circuit of having "effectively establish[ed] a *per se* rule, whether or not it is expressly stated as such." Pet. 9.

On the other hand, petitioners point out that the Sixth and Seventh Circuits apply a "rule of reason" standard in judging exclusive distributorships. Pet. 10. Thus, petitioners argue that this court's intervention is necessary to resolve the conflicting standards purportedly applied by the Second Circuit (*per se*) and the Sixth and Seventh Circuits (rule of reason).

The flaw with petitioners' argument, and it is a fatal flaw, is that the Second Circuit in no way established a *per se* rule in favor of the legality of exclusive distributorships in this case.

This Court need look no further than the decision of the Second Circuit in this case itself (Pet. App. 1-15) to confirm that the Second Circuit has not adopted such a *per se* rule. In the decision below, the Second Circuit stated "we have noted that 'exclusive distributorship arrangements are presumptively legal.' *Electronics Communs. Corp. v. Toshiba Am. Consumer Prods.*, 129 F.3d 240, at 245. ***To be sure, we have never held that all exclusive arrangements are reasonable as a matter of law.***" Pet. App. 10 (emphasis supplied).

The Second Circuit went on to distinguish at length its recent decision in *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485 (2d Cir. 2004), as an exclusive distributorship which was alleged to have involved "predatory practices designed to extend their respective temporary monopolies by deterring entry by competitors." Pet. App. 10-11. The court went on to explain that:

> The facts in *Geneva*, therefore, were quite different from the claim in a typical distribution case, like the present one, where it is alleged only that monopolist manufacturer is trying to extend its monopoly into the distribution or the sale of its product. Unlike *Geneva*, the present case is a 'run-of-the-mill exclusive distributorship controversy, where a former exclusive distributor is attempting to protect its competitive position vis a vis its supplier.' *Electronics Communs. Corp.*, 129 F.3d at 245. The complaint simply does not allege therefore, 'that the challenged action has had actual adverse effect on competition as a whole in the relevant market.' [Pet. App. 11.]

Thus, the Second Circuit made clear in its decision below that in an appropriate case, *e.g., Geneva*, an exclusive distributorship may run afoul of the antitrust laws. Thus, plaintiffs lost in the Second Circuit, not because the Second Circuit had established a *per se* rule in favor of the legality of all exclusive distributorships, but because it found that plaintiff had not alleged injury to competition in the market as a whole.

There is a difference between saying that an exclusive distributorship is "presumptively legal" and *per se* legal, as a presumption may be rebutted but a *per se* rule may not. Indeed, petitioners undercut their own argument by acknowledging in the petition that "the Second Circuit has

previously stated *in dicta* that it has not established a *per se* rule protecting exclusive distributorships from a challenge under the Sherman Act (*George Haug Co. Inc. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 140 n.1 [2d Cir. 1998]). . . ." Pet. 9.

Once petitioners' argument that the Second Circuit has established a *per se* rule in favor of the legality of all exclusive distributorship is exposed as false, it is clear that there is no inter-circuit conflict which needs the urgent attention of this court to resolve. Indeed, the Sixth and Seventh Circuit decisions cited by petitioners, *R.J. Reynolds Tobacco Co.* and *Byars*, *supra*, are cited with approval in the Second Circuit's opinion in this case. Pet. App. 9-10. Moreover, this court previously denied certiorari in the *R.J. Reynolds Tobacco Co.* case, 127 S. Ct. at 1330.

II. THE PETITION SHOULD BE DENIED BECAUSE THIS IS A GARDEN VARIETY TERMINATED DISTRIBUTOR CASE WHICH WAS PROPERLY DECIDED.

As pointed out in the Second Circuit's decision, the only harm to competition alleged by plaintiffs (Amended Complaint, ¶39, Pet. App. 50), was that "end-users of lumber and finished wood products have fewer options to purchase their required supplies and are now required to pay artificially inflated prices." Pet. App. 10. As explained by the Second Circuit: "This, by itself, is not a sufficient allegation of harm to competition caused by the exclusive distributorship, again, because the alleged single source and price increase, even if monopolistic, is something Doman can achieve without the aid of a distributor." Pet. App. 10.

The *sine qua non* of a monopolist is the ability to reduce supply, raise prices, and maximize profits. "A monopolist manufacturer of a product restricts output of the product in order to maximize its profit." Pet. App. 9. Thus, to the extent that plaintiffs have alleged any supposed harm to competition, the ability to reduce output and raise prices is the product of defendant Doman being an alleged monopolist, which is not illegal. As noted by the Second Circuit: "Appellants do not assert that Doman's market share is somehow an illegal monopoly and seek no relief on that ground." Pet. App. 9.

There is no causal connection between the harm posited (reduced output and higher prices) and the change of distributor from plaintiffs to defendant Sherwood. If Doman is a monopolist as alleged by plaintiffs, Doman can reduce output, raise prices and extract monopoly profits, whether it distributes the product itself, uses one distributor, or uses dozens of distributors. As aptly explained by the Second Circuit in its decision, "the power to restrict output to maximize profit is complete in the manufacturing monopoly, and there is no additional monopoly profit to be made by creating a monopoly in the retail distribution of the product." Pet. App. 9.

"The present case is a 'run-of-the-mill exclusive distributorship controversy, where a former exclusive distributor is attempting to protect its competitive position vis a vis its supplier.' The complaint simply does not allege, therefore, 'that the challenged action has had an actual adverse effect on competition as a whole in the relevant market.'" Pet. App. 11 (citations omitted). Not only is the present case a garden variety jilted distributor case, it was indubitably correctly decided, and there is no

jurisprudential reason for this Court to devote any more energy to it.

III. THE PETITION SHOULD BE DENIED BECAUSE THIS CASE IS NOT A GOOD CANDIDATE FOR REVIEW BY THIS COURT DUE TO OTHER DEFICIENCIES IN PLAINTIFFS' AMENDED COMPLAINT.

Although the Second Circuit's decision focused upon lack of injury to competition as grounds for dismissal, there are numerous other deficiencies in the amended complaint, which suggests that this case would not be a worthy one for review even if there were a split amongst the circuits.

Even if the amended complaint had not been dismissed for failure adequately to allege injury to competition, it was also dismissible for failure adequately to allege "antitrust injury." The antitrust laws were enacted for "the protection of competition, not competitors," and an antitrust complaint, in order to be upheld, must plead "antitrust injury," i.e., "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488-489 (1977). As pointed out by the Second Circuit, "the failure to allege harm to competition is analytically distinct from failure to plead antitrust injury." Pet. App. 7, n. 3. "It should go without saying, therefore, that a party cannot establish antitrust injury without establishing a violation of the antitrust laws, which, under Section 1, must involve an injury to competition." Pet. App. 7. As found by Judge Trager at the District Court level: "The conclusory and, at times, implausible nature of plaintiffs' allegations fail to

establish any antitrust injury and are not sufficient to make out a claim under the antitrust laws, even at this early stage of the litigation." Pet. App. 33.

The amended complaint also failed adequately to allege antitrust standing, which is distinct from "antitrust injury." The amended complaint alleges monetary injury to lumber yards and to home builders and purchasers of new homes. Amended Complaint, ¶36, Pet. App. 49. Plaintiff E&L is a commission sales agent, however, and is neither a lumber yard, nor a home builder, nor an end purchaser and lacks standing to seek to recover any such alleged damages herein. *See, e.g., George Haug Co. v. Rolls Royce Motor Cars*, 148 F.3d 136, 140 (2d Cir. 1998) (automobile parts and service provider is not a Rolls Royce dealership, and therefore did not have standing to assert any antitrust injuries suffered by Rolls Royce dealerships); *Argus, Inc. v. Eastman Kodak Co.*, 612 F. Supp. 904 (S.D.N.Y. 1985), *aff'd*, 801 F.2d 38 (2d Cir. 1986) (neither distributor nor licensor had standing to raise antitrust claims concerning a restraint at manufacturer's level); *A.G.S. Electronics, Ltd. v. B.S.R. (U.S.A.), Ltd.*, 460 F. Supp. 707, 711, *aff'd*, 591 F.2d 1329 (2d Cir. 1978) (amended complaint dismissed due to lack of an antitrust standing where the only injuries which the distributor complained of "all flow from the termination of its distributorship rather than any anticompetitive effects of the defendants' acquisition"); *GKA Beverage Corp. v. Honickman*, 55 F.3d 762 (2d Cir. 1995) (distributors may have suffered injury as a result of loss of their distributorships, but it was not direct antitrust injury which they had standing to assert).

The only harm alleged by plaintiffs is harm to themselves as competitors, but not harm to competition market wide, resulting in lack of antitrust injury and antitrust standing, which doom the case in any event. Another fatal flaw in plaintiffs' Sherman Act claims found by Judge Trager is that plaintiffs' amended complaint failed adequately to define the product market because it failed "to allege facts regarding substitute products, to distinguish among apparently comparable products, or to allege other pertinent facts relating to cross-elasticity of demand." Pet. App. 25. The allegations in the amended complaint that green hem fir lumber is a product market unto itself, because there are no substitutes, does not meet minimum plausibility requirements for a complaint in a federal antitrust action. *See, e.g., Bell Atlantic Corp. v. Twombly*, 2007 U.S. LEXIS 5901 (May 21, 2007).

There are so many deficiencies in plaintiffs' Sherman Acts claims, providing so many alternative grounds for dismissal, that review of any one ground is pointless due to the existence of numerous alternative grounds for dismissal. Since plaintiffs' petition seeks review only of the Sherman Act claims, defendant Sherwood will not address the numerous deficiencies in plaintiffs' non-Sherman Act claims.

CONCLUSION

"[When] the allegations in the complaint, however true, cannot raise a claim of entitlement to relief, 'this basic deficiency . . . should be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Id.* at *26-27. The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

E & L CONSULTING, LTD.,
dba C.B.C. LUMBER, CO., *et al.*,

Petitioners,

v.

DOMAN INDUSTRIES LIMITED, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS DOMAN INDUSTRIES LIMITED AND EACOM TIMBER SALES LTD.

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QUESTION PRESENTED

Whether a complaint challenging an exclusive distributorship agreement under the Sherman Act must allege facts that support that such an agreement had a plausible adverse effect on competition marketwide.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners are E&L Consulting, Ltd. d/b/a C.B.C. Lumber, Co. and C.B.C. Wood Products, Inc. Respondents are Doman Industries Limited, Eacom Timber Sales Ltd., and Sherwood Lumber Corp.

Respondent Eacom Timber Sales Ltd. is a wholly owned subsidiary of Respondent Doman Industries Limited ("Doman"). Doman has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of Doman's stock.

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals, Second Circuit, is reported at 472 F.3d 23. The opinion of the United States District Court, Eastern District of New York (Trager, J.), is reported at 360 F. Supp. 2d 465.

JURISDICTION

The order of the Second Circuit denying plaintiffs' petition for rehearing or rehearing en banc was entered on February 20, 2007. The petition for writ of certiorari was filed on May 18, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, as well as Fed. R. Civ. P. 12(b)(6).

STATEMENT

For fourteen years, petitioners E&L Consulting, Ltd. and C.B.C. Wood Products, Inc. (collectively, "E&L") served as the exclusive sales agent for respondents Doman Industries Limited and Eacom Timber Sales Ltd. (together, "Doman") in the distribution of Doman's green hem-fir lumber delivered to the Red Hook Port in Brooklyn, New York. In January 2004, Doman terminated its agreement with E&L, opting instead to sell its green hem-fir lumber directly to a reseller, rather than distributing it through sales agents. While E&L had hoped to become a reseller of Doman's lumber, Doman

instead entered into an agreement with respondent Sherwood Lumber Corp. ("Sherwood"). Disappointed by Doman's decision, E&L commenced an action in the United States District Court for the Eastern District of New York alleging, *inter alia*, numerous claims under the federal antitrust laws.

The district court conducted a detailed analysis of petitioners' amended complaint (Pet. App. 42-54) and properly concluded that E&L's allegations failed to state any claim. In particular, with respect to petitioners' purported antitrust claims, the district court found that the amended complaint failed to allege facts to support a finding of antitrust injury and did not define an economically meaningful relevant product market.[1] The court thus dismissed the amended complaint, holding that "[t]he conclusory and, at times, implausible nature of plaintiffs' allegations . . . are not sufficient to make out a claim under the antitrust laws, even at this early stage of the litigation." Pet. App. 33.

The Second Circuit, properly reviewing de novo the district court's grant of the Rule 12(b)(6) motion to dismiss, affirmed the judgment, stating that petitioners "have failed to allege facts that, if proven, would demonstrate harm to competition." Pet. App. 2. The Second Circuit observed that the purported restraint alleged by E&L, even if true, is not of a type that has been deemed so likely to harm competition that it will be found per se unreasonable. Petitioners' purported claims therefore were subject to review under the

---

[1] Additionally, the district court noted that petitioners' claims were brought in violation of a stay order issued by the Canadian bankruptcy court overseeing Doman's reorganization.

rule of reason, which "seeks to determine if the alleged restraint is unreasonable because its 'anticompetitive effects outweigh its procompetitive effects.'" Pet. App. 8 (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990)). Because a claim subject to the rule of reason requires the claimant to demonstrate actual anticompetitive effects, the allegations supporting such a claim must set forth facts that plausibly support a finding of competitive harm. The Second Circuit correctly found that petitioners had failed to fulfill that basic requirement on the facts alleged, even if taken as true.

Specifically, as the Second Circuit observed, petitioners' amended complaint alleges no harm to competition that *results from Doman's relationship with Sherwood.* Pet. App. 9-10. Rather, petitioners claim to have been harmed by the "inflated" price of Doman's green hem-fir lumber, made possible by *Doman's purported market power. Id.* Petitioners, however, "do not assert that Doman's market share is somehow an illegal monopoly and seek no relief on that ground." Pet. App. 9. Thus, the price increase alleged by petitioners is "not a sufficient allegation of harm to competition caused by the exclusive distributorship, . . . because the alleged single source and price increase, even if monopolistic, is something Doman can achieve without the aid of a distributor." Pet. App. 10.

Upon the Second Circuit's denial of petitioners' request for rehearing, or a rehearing en banc, petitioners filed their petition for writ of certiorari. In a transparent effort to convince this Court to provide them with yet another opportunity to vent their commercial frustration, petitioners mischaracterize the Second Circuit's opinion and attempt to create the illusion of a conflict among the circuit courts of

appeal. Petitioners' attempt to manufacture a disputed question of law from allegations that set forth "nothing more than a run-of-the-mill exclusive distributorship controversy," Pet. App. 11 (quoting *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 245 (2d Cir. 1997)), should be rejected summarily, and the petition should be denied.

REASONS FOR DENYING THE PETITION

I. PETITIONERS MISREPRESENT THE SECOND CIRCUIT'S HOLDING.

Petitioners ask this Court to grant certiorari to address "[w]hether an exclusive distributorship agreement can be challenged under the Sherman Act when it is alleged that the manufacturer has monopoly power over the supply of a unique product." The need to consider that question arises, petitioners claim, from a Second Circuit holding that "establish[s] a rule that exclusive distribution agreements are immune from liability under the Sherman Act." Pet. 3.

While petitioners assert that the Second Circuit has established a per se rule protecting exclusive distributorships, the Second Circuit's decision in this matter and others is clear: the Second Circuit has "never held that all exclusive arrangements are reasonable as a matter of law." Pet. App. 10. Rather, the Second Circuit has simply emphasized (and rightly so, as discussed more fully below) that "exclusive distributorship arrangements are *presumptively* legal." Pet. App. 10 (quoting *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d at 245 (emphasis added)); *see also Geneva Pharms Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 506-07 (2d Cir. 2004) (same); *George Haug Co.*,

Inc. v. Rolls Royce Motor Cars, Inc., 148 F.3d 136, 140 n.1 (2d Cir. 1998) ("Exclusive distributorships are not per se authorized under the Sherman Act. Instead, we have heretofore held that an exclusive distributorship agreement, standing alone, is not illegal.").

Unlike a bright-line per se rule applicable to certain other purportedly commercial relationships, such as horizontal agreements to fix prices, a presumption of legality requires the court to apply the rule of reason, under which "the plaintiffs bear an initial burden to demonstrate that the defendants' challenged behavior 'had an actual adverse effect on competition as a whole in the relevant market.'" *Geneva Pharms. Tech. Corp.*, 386 F.3d at 506-07 (citing *Capital Imaging Assocs., P.C., v. Mohawk Valley Med. Assoc., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993)); *see also* Pet. App. 11. The opinion below accordingly (and properly) analyzes petitioners' allegations in light of that established presumption, and concludes that the amended complaint "simply does not allege . . . 'an actual adverse effect on competition as a whole . . .'" Pet. App. 11.

That conclusion comports with other Second Circuit authority, in which the court has permitted claims based on exclusive dealing arrangements that *could* plausibly harm competition. In *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.*, 386 F.3d 485 (2d Cir. 2004), for example, the Second Circuit *vacated* a grant of summary judgment and remanded for trial a Section 1 claim based on an exclusive dealing arrangement. As noted in the opinion below, and distinguishable from the facts alleged here, defendants in *Geneva* — parties to an exclusive supply arrangement — "were jointly involved in predatory practices designed to . . . deter[] entry by competitors." Pet. App. 10-

11 (citing *Geneva Pharms. Tech. Corp.*, 386 F.3d at 492-93). In *Geneva*, the parties used their agreement to prevent competition from entities that could have potentially manufactured competing products. Thus, "[t]he facts in *Geneva* . . . were quite different from the claim in a typical exclusive distribution case, like the present one, where it is alleged only that a monopolist manufacturer is trying to extend its monopoly into the distribution or sale of its product." Pet. App. 11. Indeed, petitioners' allegations do not support any claim that Doman and Sherwood engaged in predatory or otherwise illegal conduct to protect Doman's position in the market.

United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003), also supports the critical distinction between exclusive dealing arrangements that have no anticompetitive effect and those in which the parties might use such an arrangement to cause jointly an anticompetitive impact, thereby transforming a pure vertical restraint to a potential horizontal conspiracy. Plaintiffs in *Visa* challenged practices including, *inter alia*, two sellers' restrictions on the right of buyers to deal with the sellers' competitors.[2] The restrictions adversely affected competition by preventing competing sellers from selling their products *at all*. *Id.* at 243. The *Visa* court found, moreover, that the sellers' imposition of restrictions on the buyers harmed competition by "reducing overall card output and available card features, as well as by decreasing network services output and stunting price competition." *Visa U.S.A., Inc.*, 344 F.3d at 240 (internal quotations omitted). Here, Doman unilaterally determined to sell green hem-fir only to

[2] The court analogized Visa, Mastercard, American Express, and Discover to *sellers* in the network services market for general purpose cards, and the thousands of banks that issue the cards to *buyers*. *Visa U.S.A., Inc.*, 344 F.3d at 243.

Sherwood. Furthermore, the agreement between Doman and Sherwood does not prevent the product at issue (Doman green hem-fir lumber) from reaching the market, but affects only the means by which that product enters the market. Unlike in *Visa*, moreover, petitioners do not (and cannot) allege that the market structure for green hem-fir has changed from when *petitioners* were Doman's sole distributor. The circumstances here are thus unlike *Visa*; while petitioners may have suffered from a loss of business, competition in the marketplace has not been affected at all, as the Second Circuit's decision properly recognized. Pet. App. 2.

In sum, petitioners' position that the Second Circuit's decision precludes challenges to exclusive distributorships is without basis. The Second Circuit has consistently applied the correct analysis in examining exclusive distributor arrangements, and properly rejected the challenge to this one for what it is — a garden variety jilted distributor case.

II. NO CONFLICT EXISTS AMONG THE CIRCUITS.

Petitioners assert that "the Second Circuit has adopted a standard which is at odds with the holdings of other circuits, and the Supreme Court should determine whether claims under the Sherman Act challenging exclusive distributorship arrangements are still viable." Pet. 7. As clarified above, however, *see supra* Point I, the Second Circuit has adopted no new standard and, indeed, makes clear the circumstances in which exclusive dealing arrangements may be successfully challenged under the Sherman Act. The law of other circuits — including the decisions that petitioners cite as supposedly contrary authority — is in accord.

Petitioners principally rely on two cases to support their assertion of a conflict among the circuits: *Byars v. Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979) and *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 696-97 (7th Cir. 2006). Both *Byars* and *R.J. Reynolds*, however, are entirely consistent with the Second Circuit's decision below. As petitioners themselves acknowledge, *Byars* stands for nothing more than the uncontroversial proposition that "'[t]here are situations . . . where a refusal to deal as part of a vertical integration scheme is anticompetitive.'" Pet. 10 (quoting *Byars*, 609 F.2d at 861). Indeed, the Sixth Circuit's language supports the Second Circuit's decision in this case: "Franchisees and distributors which have been unilaterally terminated have discovered to their chagrin that ordinarily the law offers them no remedy absent proof that a conspiracy against them took place . . . . An agreement with another distributor to replace the terminated distributor does not count as a conspiracy." *Byars*, 609 F.2d at 854-55 (internal citations omitted).

Similarly, the Seventh Circuit's decision in *R.J. Reynolds* (which does not even address an exclusive dealing arrangement) is also consistent with the Second Circuit's decision. Petitioners cite the Seventh Circuit's observation, in dicta, that "'a retail cartel might be able to compensate a producer that organizes and coordinates their group . . . .'" Pet. 10 (quoting *R.J. Reynolds Tobacco Co.*, 462 F.3d at 697). Even if that had been the Seventh Circuit's *holding*, it has no bearing on the facts alleged here, as petitioners' allegations in no way allege a retail cartel. And even if such dicta were relevant to this matter, it in fact comports with more analogous Second Circuit authority. Specifically, as the Second Circuit recognized in *Geneva*, in which the defendants allegedly undertook predatory conduct to prevent

competition from other suppliers, there are circumstances in which exclusive dealing arrangements may run afoul of the antitrust laws. Were the Second Circuit called upon to evaluate a claim of exclusive dealing that involved a retail cartel — not present in this case — the analysis would presumably follow the reasoning set forth in *Geneva*.

In sum, the supposed "circuit split" that petitioners urge this Court to resolve is nonexistent. Petitioners' assertions to the contrary are based on their mischaracterization of the Second Circuit's holding, as well as citation to an entirely consistent decision (*Byars*) and inapposite authority (*R.J. Reynolds*).

III. THE SECOND CIRCUIT'S HOLDING IS CONSISTENT WITH SUPREME COURT PRECEDENT.

The Second Circuit's decision is also completely in accord with this Court's prior authority on vertical restraints, which encompasses the exclusive distributor arrangement challenged here. Thirty years ago, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), this Court held that a territorial restriction imposed by a franchisor on its franchisees should be analyzed under the rule of reason rather than subject to a per se determination of illegality. *Id.* at 59. The Court reasoned that "[*w*]*hen anticompetitive effects are shown to result from particular vertical restrictions* they can be adequately policed under the rule of reason." *Id.* (emphasis added).

Here, the Second Circuit addressed a question analogous to that in *Continental T.V.*: the legality of Doman's decision to sell its products in a specified geographic area through a

single reseller. The Second Circuit recognized that, where a plaintiff fails to allege facts that fulfill the threshold requirement set forth in *Continental T.V. — i.e., that the challenged restriction have an anticompetitive effect* — the plaintiff has failed to state a claim that is subject to review under the rule of reason. Accordingly, in light of petitioners' failure to allege facts that plausibly suggested how such an arrangement could have reduced competition in the sale of green hem-fir lumber, the court affirmed the dismissal of petitioners' amended complaint.

This Court has recently reemphasized that a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face" and, by averring such facts, "nudge[] [its] claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. __, 127 S. Ct. 1955, 1974, 2007 WL 1461066 (2007). Here, petitioners have failed to allege *any* fact to support an essential element of their claim. The Second Circuit thus properly affirmed the dismissal of the amended complaint.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 06-1549

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IN THE

Supreme Court of the United States

E & L CONSULTING, LTD. d/b/a C.B.C. LUMBER, CO.; and C.B.C. WOOD PRODUCTS, INC.,

Petitioners,

v.

DOMAN INDUSTRIES LIMITED; EACOM TIMBER SALES LTD.; and SHERWOOD LUMBER CORP.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

E & L CONSULTING, LTD. d/b/a C.B.C. LUMBER, CO.; and C.B.C. WOOD PRODUCTS, INC.,

Petitioners,

v.

DOMAN INDUSTRIES LIMITED; EACOM TIMBER SALES LTD.; and SHERWOOD LUMBER CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

E&L Consulting, Ltd. and CBC Wood Products, Inc. petition for a writ of certiorari for review of the Opinion of the United States Court of Appeals for the Second Circuit upholding the dismissal of petitioners' Sherman Act claims based upon a finding that the Amended Complaint did not sufficiently allege an injury to competition. As set forth in the Petition, the Second Circuit's decision necessarily establishes a *per se* rule that exclusive distributorships, in and of themselves, cannot be challenged under the Sherman

Act because if it is permissible for a monopolistic supplier, as a matter of law, to assert its monopoly vertically into a resale market, any claim challenging an exclusive distributorship which eliminates competition at the resale level is effectively prohibited. Accordingly, the Second Circuit's decision in this case is contrary to the holdings of other circuits which have applied a rule of reason analysis to determine whether an exclusive distributorship agreement by a monopolistic supplier may illegally harm competition at the resale level so as to support a viable cause of action under the Sherman Act.

In opposition to the Petition, the Respondents assert that there is no conflict among the circuits because the Second Circuit has not expressly adopted a *per se* rule that exclusive distribution arrangements are legal, and that this action involves garden variety allegations by a terminated distributor. As explained below, although the Second Circuit has only expressly stated that there is a "presumption" that exclusive distributorships do not violate the Sherman Act – which presumption has never been adopted by this Court – the reasoning by the Second Circuit would necessarily apply to any assertion that an exclusive distributorship, in and of itself, violates the Sherman Act. Further, this is not a "garden variety" exclusive distributorship involving fungible brands of a freely interchangeable product, but involves an exclusive distributorship agreement entered into by a monopolistic supplier for a specific type of wood material for which it is alleged there are no adequate substitutes. Accordingly, this Court should determine in the context of this case whether challenges to exclusive distributorships between a monopolistic supplier and a reseller are still viable under the Sherman Act.

I. THE SECOND CIRCUIT'S OPINION IS IN CONFLICT WITH RULINGS FROM OTHER CIRCUITS

Respondents contend that there is no conflict among the circuits because the Second Circuit has not expressly adopted a *per se* rule that exclusive distributorship agreements are immune from liability under the Sherman Act. However, although the Second Circuit only states that exclusive distribution agreements are presumed legal, a presumption that has not been adopted by this Court, the actual import of the decision in this case is to effectively preclude any claim under the Sherman Act challenging an exclusive distribution arrangement.

Respondents do not explain how the Second Circuit's holding that, as a matter of law, competition to injury cannot be found by an exclusive distribution agreement because a supplier could distribute its product directly, would permit any claim under the Sherman Act challenging an exclusive distribution arrangement as improperly restricting competition at the resale level. The reasoning by the Second Circuit is such that injury to competition can never be alleged by reason of an exclusive distribution agreement so as to sustain a Sherman Act claim. Thus, even it is not called as much, a *per se* rule has been established.

In addition, the Opinion also makes clear that the prior Second Circuit holding in *Geneva Pharms. Tech. Corp. v. Barr Labs, Inc.*, 386 F.3d 485 (2d Cir. 2004) is reconcilable to such a *per se* rule because the finding of a valid claim in *Geneva* was based on factors other than the exclusive distribution arrangement. Specifically, the Second Circuit notes that *Geneva* involved an allegation of two temporary, related monopolies in different products, and "the two firms, which had overlapping ownership, were jointly involved in predatory practices," including making false representations (Pet. App. 10). Accordingly, the decision here makes clear that the exclusive arrangement in

Geneva was not the basis of allowing the Sherman Act claims to proceed. And, the Second Circuit stated that in *Geneva* the "general rule that 'it usually does not further harm competition for a monopolist in one market to leverage its advantage into a monopoly in a downstream market'" was acknowledged (Pet. App. 10).

Further, the Second Circuit's holding in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003) is also reconcilable to the determination in the decision here precluding claims involving vertical restrain in the form of an exclusive distributorship arrangement. In *Visa U.S.A.*, the restrictions at issue included horizontal restraints and whether a vertical restriction by way of an exclusive distributorship is actionable was not at issue.

Accordingly, the Second Circuit's Opinion is clearly in contrast with the Sixth Circuit's holding in *Byars v. Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979), wherein it was held that a specific factual analysis must be undertaken to determine whether or not exclusive distributorship can be challenged under the Sherman Act. In *Byars*, it was explained that the factual analysis would include whether there are adequate substitutes that may be obtained by a retailer, as well as the overall effect on the retail market if resellers are eliminated by reason of an exclusive distribution arrangement.

The Sixth Circuit's approach in *Byars* is consistent with a rule of reason analysis of a challenge to an exclusive distribution arrangement. A Court should not just simply hold, as a matter of law, that a monopolistic supplier would be able to effectively eliminate competition at the resale level in and by itself, and thus the fact that a monopolistic supplier has entered into an exclusive distribution agreement cannot be the basis for a Sherman Act claim. The Second Circuit reasoning ignores the myriad of limitations on a monopolistic supplier's ability to act as a distributor,

including the ability to obtain the necessary infrastructure in a retail market such as stores, delivery points and employees.

Further, while it might be an accurate economic analysis to determine that a monopolistic supplier can only take one monopoly profit, this reasoning should not preclude a challenge to an exclusive distribution arrangement under the Sherman Act. The proper analysis under the Sherman Act is not with regard to the monopolistic profit, but the harm to competition. Here, there existed competing resellers which created limitations on the resale price of green hem fir lumber, and after this competition was eliminated by the exclusive distribution agreement which is sought to be challenged, these competitive restrictions on retail prices were eliminated and, in fact, resulted in a marked increase in the price for green hem fir lumber.

The Second Circuit undertook no factual analysis of the effect on the green hem fir market of this exclusive distribution agreement such as whether other adequate substitutes were available, nor whether the demand for green hem fir as compared to its supply was such as to provide both respondents with an incentive to eliminate competition at the resale level. Instead, at the pleading stages, the Second Circuit affirmed the dismissal of the Amended Complaint. The dismissal of the Amended Complaint, as a matter of law, only emphasizes that a *per se* rule has effectively been established immunizing exclusive distribution arrangements from challenge under the Sherman Act. By contrast, under the Sixth Circuit's reasoning in *Byars,* a factual analysis as to whether, in fact, the complained of exclusive distribution agreement harmed competition at the resale level would have been required, highlighting the conflict between the Circuits that should be resolved by this Court.

II. THE AMENDED COMPLAINT ASSERTS THAT THE EXCLUSIVE DISTRIBUTION AGREEMENT INVOLVED A MONOPOLISTIC SUPPLIER OF A UNIQUE PRODUCT, NOT A GARDEN-VARIETY COMPLAINT BY AN EXCLUSIVE DISTRIBUTOR WHO HAS BEEN REPLACED

Respondents contend that this is simply a case of a jilted distributor, and that all that is involved is a garden-variety dispute which was properly decided by the Second Circuit. To the contrary, this case does not involve an exclusive distribution arrangement for a brand-name product which is interchangeable with other brands, such as one brand of telephones that can easily be replaced by another brand (*see Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240 [2d Cir. 1997]). Instead, this Amended Complaint asserts claims against a supplier who has monopolistic control of a unique product that has no adequate substitutes, which supplier is vertically imposing its monopoly at the resale level.

As such, this case presents an important issue of whether or not a monopolistic supplier of a unique product is free to enter into exclusive distribution arrangements, or may be required to make its product available to multiple resellers so as to allow competition at the resale level. This Court has not provided any recent guidance as to whether Sherman Act claims challenging an exclusive distribution arrangement are viable, and this Court should address this issue in the context of this case.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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